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### Writ of Error.

NEW JERSEY, ss.: The State of New Jersey to  
the Chief Justice and other Justices of  
our Supreme Court of Judicature,  
[L. s.] Greeting:

Because in the record and proceed- 10  
ings and in the giving of judgment and  
in the affirming of judgment upon a certain indict-  
ment against Charles Oliver, of the City of New  
Brunswick, County of Middlesex, and State of  
New Jersey, for manslaughter.

*Pro ut* the said indictment whereof the said  
Charles Oliver has been convicted, manifest error  
has intervened to the great damage of the said  
Charles Oliver, as by his complaint we are in- 20  
formed, we being willing that the error if any  
there be, should be corrected and full and speedy  
justice be done to the parties aforesaid in this  
behalf, do command you that if judgment be there-  
upon given and affirmed then you distinctly and  
openly send under your seal the record and pro-  
ceedings aforesaid with all things touching and  
concerning the same to our Judges of our Court  
of Errors and Appeals in the last resort in all  
causes, at Trenton on the twenty-first day of  
March, Nineteen Hundred and Thirty, together 30  
with this writ, that the record and proceedings  
aforesaid being inspected, we may cause to be  
done further thereupon for correcting that error  
what of right and according to the laws and cus-  
toms of the State of New Jersey ought to be done.

Witness, Honorable Edwin Robert Walker, our  
Chancellor and President Judge of our said Court

*Writ of Error.*

of Errors and Appeals, at Trenton aforesaid, the first day of March, Nineteen Hundred and Thirty.

JOSEPH F. S. FITZPATRICK,  
Clerk.

10 AUGUSTUS S. DREIER,  
Attorney.

W. S. ANGLEMAN,  
Of Counsel.

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**Return.**

20 The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,  
C. & P. J.

30

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**Assignment of Errors.**

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

<p style="text-align: center;">STATE OF NEW JERSEY, Defendant-in-Error,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CHARLES OLIVER, Plaintiff-in-Error.</p>	}	<p style="text-align: right;">10</p> <p style="text-align: center;">On Error. Assignment of Errors.</p>
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Afterwards, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, comes the said Charles Oliver, by Augustus S. Dreier, his attorney, and says that in the record and proceedings aforesaid, and also in the matter recited and contained in the said bill of exceptions, and also in the giving of judgment aforesaid, there is manifest error in this, to wit:

1. The Supreme Court erred in affirming the judgment under review.

AUGUSTUS S. DREIER,      30  
Attorney for Defendant-in-Error.

W. S. ANGLEMAN,  
Of Counsel.

**Joinder in Error.**NEW JERSEY COURT OF ERRORS  
AND APPEALS.

10

STATE OF NEW JERSEY,  
Defendant-in-Error,*vs.*CHARLES OLIVER,  
Plaintiff-in-Error.In Error.  
Joinder in Error.

20

And thereupon the State of New Jersey, defendant-in-error, by Abe J. David, its attorney, comes into Court and says that there is no error either in the record and proceedings aforesaid or in the giving of judgment aforesaid, and it prays here that the Court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error and the judgment aforesaid, in the manner aforesaid given, may in all things be AFFIRMED, etc.

30

ABE J. DAVID,  
Attorney for Defendant-in-Error.

40

**Supreme Court Opinion.**

(Filed February 18, 1930.)

NEW JERSEY SUPREME COURT,

No. 6 MAY TERM, 1929.

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STATE OF NEW JERSEY,  
Defendant-in-Error,

*vs.*

CHARLES OLIVER,  
Plaintiff-in-Error.

---

10

In error to Union County General Quarter Sessions Court.

Before Gummere, Chief Justice, and Justices Kalisch and Campbell.

For the plaintiff-in-error AUGUSTUS S. DREIER.

For the defendant-in-error ABE J. DAVID,  
WALTER C. TENNY, of counsel.

20

30

*Per curiam:*

The plaintiff-in-error was convicted in the Union County General Quarter Sessions Court on an indictment charging him with manslaughter. The crime grew out of the reckless driving of an automobile by the plaintiff-in-error on a public highway, causing the death of one Edwin Fitzpatrick.

40

*Supreme Court Opinion.*

The case is before us on strict writ of error and bills of exceptions and under the 136th section of the criminal procedure act.

There are eleven assignments of errors and the same number as reasons for reversal.

10 Counsel of plaintiff in error, in his brief, says: "All these reasons are relied upon but for the purpose of argument they may be *conveniently* grouped under two heads: (1). State did not have a case on which a verdict of guilty could be legally predicated. (2). Errors of the court."

Under the caption "State did not have a case" it is argued on behalf of the plaintiff-in-error that there was no proof of criminal negligence to be submitted to the jury.

20 After the State rested, counsel of plaintiff-in-error asked for a direction of a verdict upon the ground that the proof on part of the State did not tend to establish that the death of the decedent was caused by the plaintiff-in-error as a result of his reckless disregard of human life, in the operation of the automobile, which request for the direction of a verdict was refused by the trial judge and an exception was taken to such refusal.

30 No testimony was offered on behalf of the plaintiff-in-error, and the case was submitted to the jury on the testimony adduced by the state.

We think, after a careful examination of the testimony, that there was proof tending to establish that the plaintiff-in-error was operating his automobile along the public road under such physical conditions and circumstances, and in such a manner, from which a jury might reasonably draw the inference that he was driving his automobile with a reckless disregard of human life.

40

*Supreme Court Opinion.*

The record discloses that the plaintiff-in-error has only one arm. It further appeared from the testimony of two physicians that he was intoxicated. There was also testimony that he was driving his automobile along the public road at a speed of more than twenty-five miles an hour, that it was dark and that his automobile crashed headlong into decedent's motorcycle, and with such force as to throw the decedent high up into the air, inflicting fatal injuries of which the deceased died within twenty-four hours. 10

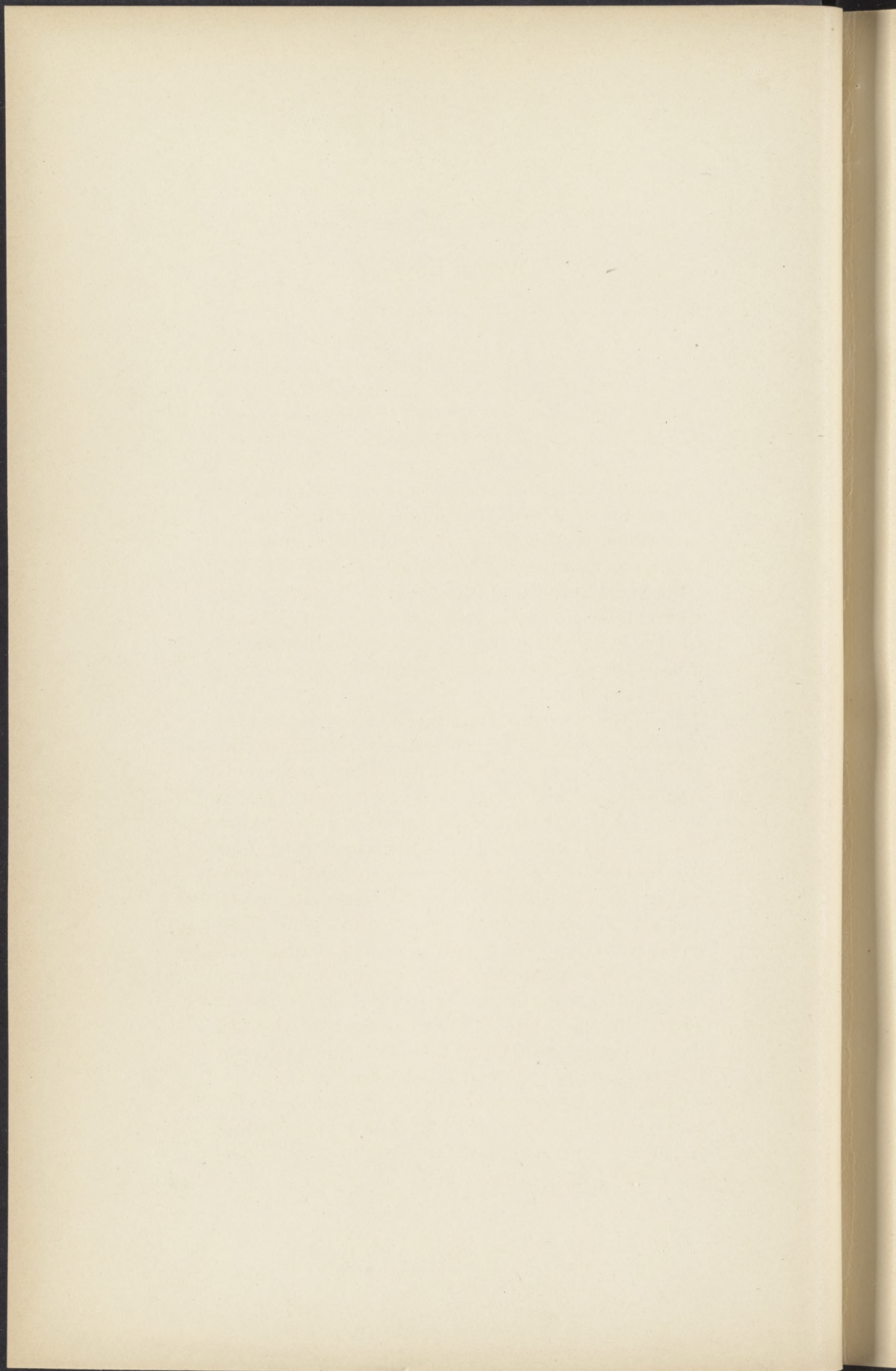
We think therefore, that the trial judge was fully warranted in refusing to take the case from the consideration of the jury. *State v. Fairbrothers*, 99 N. J. L. 295.

We cannot help observing here, that a man with one arm, in a state of intoxication, propelling an automobile along a public and frequented road, at a speed of more than twenty-five miles an hour, is, manifestly, a menace to life and limb. 20

As has been previously mentioned there are eleven assignments of errors and the same number of reasons for reversal. We look in vain, however, under caption two of the brief of plaintiff-in-error, entitled: "Errors of the Court" for any assignment or specification of cause for reversal that points out intelligibly the specific error in the charge of the trial judge or in the admission or rejection of testimony. 30

We have examined the assignments of errors and specification of causes for reversal, however, and find no substance in them.

The judgment is affirmed.



## Writ of Error.

NEW JERSEY, SS.:

*The State of New Jersey, to Hon.  
Alfred A. Stein, Judge of the Union  
County Court of Quarter Sessions,  
Greeting:* 10

Because in the record and also in the giving of judgment in a certain complaint which was in said Court of Union County Quarter Sessions before you, between the State of New Jersey, Defendant-in-Error, and Charles Oliver, Plaintiff-in-Error, upon a certain indictment against the said Charles Oliver, of the City of New Brunswick, County of Middlesex, and State of New Jersey, for manslaughter. 20

*Pro ut* the said indictment and the counts therein, manifest error hath intervened to the great damage of the Plaintiff-in-Error, as by his complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and affirmed then you distinctly and openly send under your seal, the record and proceedings and *plaint* aforesaid with all things touching and concerning the same to our Justices of our Supreme Court, of the State of New Jersey, on the 9th day of January next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon, for correcting that error what of right and according to the law and custom of the State of New Jersey ought to be done. 30 40

*Writ of Error.*

WITNESS, WILLIAM S. GUMMERE, Esquire, our Chief Justice at Trenton aforesaid, the 20th day of December, Nineteen Hundred and Twenty-eight.

FRED L. BLOODGOOD,  
Clerk.

10

ROBERT NEWTON CRANE,  
Attorney of Plaintiff-in-Error.

In obedience to the command of the Writ to me, ALFRED A. STEIN, Judge of the Court of Quarter Sessions of the County of Union, directed, I do HEREBY under my seal and hereunto annexed send the Indictment against CHARLES OLIVER and the record and proceedings of the plaint whereof mention is made within, with all things touching and concerning the same, to our Supreme Court of Judicature at Trenton, within specified at the time and place within mentioned, as within I am commanded as appears by the schedule hereto annexed.

20

(Signed) ALFRED A. STEIN,  
Judge of the Court of Quarter  
Sessions of the County of  
Union.

30 [SEAL]

The execution of this Writ appears by the schedule hereto annexed.

IN WITNESS WHEREOF, I, WILLIAM B. MARTIN, Clerk of the Court of Quarter Sessions in and for said County have hereunto subscribed my name and affixed the seal of said Court, this 28th day of December, A. D., Nineteen Hundred and twenty-eight.

40

(Signed) WM. B. MARTIN,  
Clerk.

[SEAL]

**Indictment.**

UNION OYER AND TERMINER.

October Term A. D., Nineteen hundred and twenty-eight.

UNION COUNTY, to-wit:

10

The Grand Inquest for the State of New Jersey, and for the body of the County of Union upon their oath

Present, that Charles Oliver, late of the City of Linden, in the said County of Union, on the sixteenth day of October in the year of our Lord one thousand nine hundred and twenty-eight at the City of Linden in the said County of Union, and within the jurisdiction of this Court with force and arms one Edwin Fitzpatrick then and there being in the peace of God and of this State, unlawfully and feloniously did kill and slay, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

20

WITNESSES:

ABE J. DAVID,  
Prosecutor of the Pleas.

30

40

*Indictment.*

No. 135

UNION OYER AND TERMINER  
October Term, A. D. 192810 INDICTMENT  
For Manslaughter

THE STATE

*vs.*

CHARLES OLIVER

ABE J. DAVID,  
Prosecutor of the Pleas.

20 A TRUE BILL

W. J. KENEALY,  
ForemanUnion Co. Clerk's Office  
Filed Nov. 2, 1928  
WM. B. MARTIN, Clerk.30 STATE OF NEW JERSEY, }  
COUNTY OF UNION, } ss.:40 BE IT REMEMBERED, That at the Court of Oyer  
and Terminer, holden at the City of Elizabeth, in  
and for the County of Union, on the second Tues-  
day of October in the year of our Lord one thou-  
sand nine hundred and twenty-eight, before the  
Honorable Samuel Kalisch, one of the Justices of  
the Supreme Court of Judicature of the State of  
New Jersey, and the Honorable Alfred A. Stein

*Indictment.*

Judge of the Court of Common Pleas in and for  
the County of Union, upon the oaths of

Robert Cardwell	Herbert H. Foster	
Walter W. Waters	William M. Kelly	
John Ross Bates	Elliott C. Dill	
Edward A. Kammler	Chester W. Caskie	10
Dr. Harry Epstein	Everett S. MacWhinney	
Charles L. Ryder	Robert J. Hyde	
Marion S. Ackerman	Walter F. Phelan	
George D. Cornish	J. Herbert Pearsall	
Clarence W. Spicer	Mrs. Bertha Epstein	
Stephen B. Van Hoesen	Chester J. Hoyt	
Edwin H. Oswald	William J. Kenealy	
D. C. Newman Collins		

good and lawful men and women of said County  
of Union, then and there sworn and charged to 20  
inquire on behalf of the State of New Jersey, in  
and for said County of Union, it is presented by  
at least twelve of said Jurors in the manner and  
form following, to wit:

The bills herewith presented are true bills.

W. J. KENEALY,  
Foreman.

ABE J. DAVID,  
Prosecutor of the Pleas. 30

And afterwards, that is to say, at a Court of  
Quarter Sessions, holden at Elizabeth, in said  
County of Union, on Friday, November second,  
in the year of our Lord, One thousand nine hun-  
dred and twenty-eight before Honorable Adam O.  
Robbins, Acting Judge of the Court of Common  
Pleas, constituting the Court of Quarter Sessions  
in and for said County of Union, according to the  
form of the statute in such case made and pro- 40

*Indictment.*

10 vided, the Grand Jury presented the Indictment aforesaid, which said Indictment was thereupon ordered by the Court of Oyer and Terminer of said County to be delivered to the Clerk of the Court of Quarter Sessions of said County who is directed to affile the same in the Court of Quarter Sessions according to the form of the statute in such case made and provided, and thereupon the said Indictment is delivered to the Clerk of said Court of Quarter Sessions of said County.

20 And afterwards, that is to say, at the same term of the said Court of Quarter Sessions, holden at Elizabeth aforesaid, on Friday, November ninth, in the year last aforesaid, comes the said Charles Oliver in his own person and now here touching the premises in the said Indictment above specified and charged upon him, being asked in what manner he would acquit himself thereof, says that he is Not Guilty thereof, and of this he puts himself upon the Country, etc., and Abe J. David, who prosecutes for the State in this behalf doth likewise the same.

30 And afterwards, that is to say, at the same term of the said Court of Quarter Sessions, holden at Elizabeth aforesaid, on Friday, the seventh day of December, in the year last aforesaid, before Honorable Alfred A. Stein, the Judge aforesaid, the said Charles Oliver being set to the Bar, Abe J. David, who prosecutes for the State moves the trial of the Indictment aforesaid. Wherefore let a jury thereupon come on this day last aforesaid, before this Court of Quarter Sessions, aforesaid, of good and lawful men of the County of Union aforesaid, by whom the truth of the matter may be better known and who are not of kin to the said Charles Oliver to recognize upon their oaths  
40 whether the said Charles Oliver be guilty of Man-

*Indictment.*

slaughter as in the Indictment aforesaid specified or not guilty, because as well as the said Abe J. David, who prosecutes for the State in this behalf as the said Charles Oliver has put himself upon the said Jury and the Jurors of the said Jury by Samuel H. Tool, Sheriff of said County of Union for this purpose impanelled and returned agreeable to the statute in such case made and provided, to wit: 10

- |                        |                         |
|------------------------|-------------------------|
| 1. Russell E. Iles     | 7. John Fischer         |
| 2. Herbert W. Augevine | 8. Norman A. Hoose      |
| 3. Alfred S. Bennett   | 9. Edward L. Witting    |
| 4. David Collins       | 10. William F. Savoye   |
| 5. Hubert E. Earl      | 11. Albert Heitmann     |
| 6. Simon Nelson        | 12. Benjamin F. Stevens |

who being chosen, tried and sworn to speak the truth of and concerning the premises, on the day and year last aforesaid, returned into Court, in charge of the officer sworn to attend them and then and there upon their oaths say they find the said Charles Oliver "Guilty" in manner and form as charged in the Indictment and so say they all. 20

And afterwards, that is to say, at the same term of the Court of Quarter Sessions holden at Elizabeth aforesaid, in the County aforesaid, on Wednesday, the twelfth day of December, in the year of our Lord, One Thousand Nine Hundred and Twenty-eight, before Honorable Alfred A. Stein, Judge of the Court of Common Pleas, constituting the Court of Quarter Sessions in and for said County of Union, according to the form of the Statute in such case made and provided, the said Charles Oliver being set to the Bar, Abe J. David, who prosecutes for the State in this behalf moves for judgment on the said Charles Oliver. 30

Whereupon all and singular the premises being seen and by the Court now here fully understood. 40

*Certificate of Reasonable Doubt.*

IT IS ORDERED and adjudged that the said Charles Oliver having been convicted of the crime of Manslaughter be imprisoned in the New Jersey State Prison for a term of one (1) year, at hard labor upon this conviction and that he pay the costs of this prosecution.

10 And the said defendant in mercy, etc.

Judgment signed Dec. 28th, 1928.

ALFRED A. STEIN,  
Judge.

20 **Certificate of Reasonable Doubt.**

UNION COUNTY COURT OF QUARTER  
SESSIONS.

30	<p style="text-align: center;">STATE OF NEW JERSEY, Complainant,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CHARLES OLIVER, Defendant.</p>	}	<p>On Indictment for Manslaughter.</p>
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It appearing to the Court that the defendant, Charles Oliver, sued out a writ of error in the Supreme Court of New Jersey, for the purpose of reviewing his conviction on this indictment, and application now being made by the said defendant to be admitted to bail, and application for that purpose being made to the Court in which the

40

*Certificate of Reasonable Doubt.*

conviction was had, for a certificate setting forth that there is reasonable doubt as to the validity of the conviction of said defendant;

THEREFORE, I, ALFRED A. STEIN, Judge of the Union County Court of Quarter Sessions, the Court in which this conviction was had, do certify that there is reasonable doubt as to the validity of said conviction. 10

AND I DO THEREFORE ORDER that the defendant, Charles Oliver, be admitted to bail in the sum of Fifteen Hundred Dollars which said sum is fixed by me as a reasonable sum for bail, pending the prosecution of said writ of error;

AND I DO FURTHER ORDER that upon the giving of said bail to the Sheriff of the County of Union, the defendant be released from custody pending the prosecution of said writ of error. 20

On motion of Robert Newton Crane, attorney of defendant.

ALFRED A. STEIN,  
Judge of Union County Court  
of Quarter Sessions.

30

40

**Testimony.**

UNION COUNTY COURT,  
ELIZABETH, NEW JERSEY.

10

<p>THE PEOPLE OF THE STATE OF NEW JERSEY <i>vs.</i> CHARLES OLIVER.</p>
---

} Indictment 135.

Elizabeth, New Jersey,  
Friday, December 7, 1928.

20 Before

Hon. ALFRED A. STEIN, J., and a Jury.

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Appearances:

JOHN J. WALSH, Esq., Assistant District At-  
torney, for the People of the State of  
New Jersey;

30

ROBERT CRANE, Esq., Attorney for the De-  
fendant.

---

(Mr. Walsh opens for the People.)

40

*George Horre, for State—Direct.*

GEORGE HORRE, a witness called on behalf of the State, having been first duly sworn, testified as follows:

*Direct examination by Mr. Walsh:*

Q. Doctor Horre, you are a regularly licensed and practicing physician of the State of New Jersey? A. I am. 10

Q. And were such on October 16th of this year? A. Yes, sir.

Q. Do you occupy any official position in the County of Union? A. Assistant County Physician.

Q. And in your capacity as Assistant County Physician were you called upon to autopsy the body of one Edward Fitzpatrick? A. Yes, sir. 20

Q. And when and where did you perform that autopsy? A. It was performed at Martin's Morgue. I have forgotten the date. It was in October, I believe.

Mr. Crane: If your Honor please, in order to make myself perfectly plain, I am entirely willing to admit that the deceased came to his death as the result of coming into collision with the automobile of the defendant. 30

The Court: I suppose that the Prosecutor, with that admission on the record, still wants to show the injuries on the body in connection with the accident.

Mr. Walsh: Yes.

Q. I show you this report, Doctor. Is that made by you? A. It will help my memory to look at that (looking at paper). Yes. 40

*George Horre, for State—Direct.*

Q. Is that the report submitted by you? A. Yes.

Q. When and where did you perform this autopsy? A. It was performed at Martin's Morgue, October 18th, 1928, at nine o'clock in the morning.

10 Q. By whom was the autopsy performed? A. By myself.

Q. And what did that autopsy disclose to you? A. You mean the cause of death?

Q. What did you find on the body? And, later on, the cause of death? A. This man was a male, twenty-seven years of age, five feet ten inches in height, one hundred and ninety pounds—

Mr. Crane (interrupting): Certainly your autopsy did not show that.

20 The Court: Why not? He had the man there before him.

Mr. Crane: I object to the witness reading from this report.

The Court: Put the report to one side.

Q. Have you any other memorandum that will refresh your memory?

30 Mr. Crane: I object to his using any memorandum unless it is necessary to refresh his memory.

By the Court:

Q. Can you recall this autopsy now from memory, without your notes? A. I cannot.

By Mr. Walsh:

Q. All right; go ahead, then, and use your notes. You say he was an adult male? A. Yes.

40 Q. And his height? A. Five feet ten.

*George Horre, for State—Direct.*

Q. And in your opinion, how many years old?

A. About twenty-seven years of age.

Q. What else did that disclose, Doctor? A. It showed that he had blue eyes and brown hair; external marks, body lacerated, face and hands; abrasion, three-quarters of an inch in diameter, one inch to the right of the middle line of the second intercostal space.

10

Q. Where is that? A. One inch to the right of the middle line of the chest; echymosis of the left eye, commonly known as black eye; abrasion of the right forehead and nose; abrasion on the right knee on the inner surface; three abrasions of the left knee, only one on the inner surface of the left knee; this was sewed with three sutures; abrasions and contusions of thigh on the inner surface; abrasions of the penis and a large hematoma of the scrotum.

20

Q. By hematoma you mean what? A. A collection of blood underneath the skin. Chest: Fracture, trauma, that is, of the breastbone, and three ribs fractured, commencing on the third rib; hematoma over the left side of the chest. He had an old polypus at the back of the right lung—

Q. (interrupting) That had healed, hadn't it?

A. (continued) That was an old lesion.

Q. Healed at that time? A. Yes; the heart showed nothing unusual. Abdomen: A sero-sanguineous fluid in the peritoneal cavity; hemorrhage of the mesocolon; collection of blood into the cavity that holds the intestines; he had a hemorrhage of the transverse colon; that is, first in the abdominal cavity, and he also had a collection of blood beneath the membrane of the stomach compressed in the anterior surface. The liver had three large cracks running transversely; several small rents in the spleen; specially marked

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40

*George Horre, for State—Cross.*  
*Hyman Mendelowitz, for State—Direct.*

at the upper pole; peri-capsular hemorrhage of both kidneys.

10 Q. Peri-capsular means what, Doctor? A. Small hemorrhage around both kidneys. The extremities showed a fracture of the left humerus, the left arm midway between the shoulder and the elbow broken in half; fracture of the tibia just below the knee joint; the head showed no fracture. Cause of death: fracture of the left tibia, left humerus, and the sternum, rupture of the liver and spleen, and hematoma of the mesocolon; secondary was a terminal fatal pneumonia.

Q. Did the hemorrhage of the kidneys have anything to do with it? A. I spoke about the peri-capsular hemorrhage in both kidneys.

20 Q. So all this was the cause of the death? A. Yes.

*Cross-examination by Mr. Crane:*

Q. Did you make a chemical analysis of the contents of the stomach? A. No, sir.

---

30 HYMAN MENDELOWITZ, a witness called by the State, being first duly sworn, testified as follows:

*Direct examination by Mr. Walsh:*

Q. Are you still an interne in the St. Elizabeth Hospital? A. Yes.

Q. Were you such on October 16th? A. Yes, sir.

Q. Did you see Edward Fitzpatrick on that day? A. I did.

40 Q. Did you treat him on that day? A. I did, yes, sir.

*Hyman Mendelowitz, for State—Direct.*

Q. When and where? Were you at the hospital when he was brought to the hospital? A. Yes.

Q. What treatment did you apply to him? A. I set his fractured humerus and I sutured a laceration of the left leg, I believe, and I gave him supportive measures for his heart.

Q. At what time was he brought to the hospital, if you remember? A. At about seven o'clock P. M. 10

Q. How long did you continue to treat him? A. At different times; first I treated him in the emergency room for about half an hour, and then he was taken upstairs to a private room.

Q. After being taken upstairs to the private room, did you see him again there? A. I did.

Q. Did you apply any treatment then? A. No, sir; the case was turned over then to the hands of another house physician. 20

Q. Do you know at what time he died? A. About eight o'clock the next night.

Q. On October 17th? A. October 17th.

Q. Did you examine him to find out if he was alive or dead? A. I pronounced him dead.

Q. After an examination? A. Yes, after an examination.

Q. Where was that? A. At the Saint Elizabeth Hospital. 30

By Mr. Crane:

Q. There is no question about the man dying, is there, Doctor? A. None at all.

*Abraham H. Barr, for State Direct.*

ABRAHAM H. BARR, a witness called by the State, having been first duly sworn, testified as follows:

*Direct examination by Mr. Walsh:*

10 Q. You are a regularly licensed and practicing physician of the State of New Jersey? A. I am.

Q. And have been for how long? A. Eight years in the State.

Q. Do you occupy any official position in the City of Linden? A. I do; Police Surgeon.

Q. In the performance of your duties as a police surgeon, were you called upon to make an examination of Charles Oliver, the defendant at the bar? A. I was.

20 Q. When did you make that examination? A. I don't remember the date; but I think it was in October, though.

Q. I show you this memorandum, and I ask you if that is made in your handwriting? A. It is.

Q. Is that a memorandum made by you? A. Yes.

Q. Will that refresh your recollection? A. Yes.

Q. To whom did you give this memorandum? A. To one of the police officers who brought this man in.

30 Q. Your consultation of this refreshes your memory? A. Yes, sir.

Q. Now, could you say when you made the examination of Charles Oliver? The date? A. October 16th, 1928.

Q. About what time in the day? A. At about seven o'clock P. M.

Q. Where did you examine him? A. At my office.

40 Q. For what purpose? A. For the purpose of finding out whether the man was intoxicated or not, and also under the influence of liquor.

*Abraham H. Barr, for State Direct.*

Q. You say you did examine him? A. I did examine him, yes.

Q. How did he come to your office, if you know?  
A. He was brought down by an officer.

Q. Do you remember which officer? A. I think it was Officer Breen, if I am not mistaken.

Q. And at your office you conducted an examination to find out whether he was under the influence of intoxicating liquor, did you not? A. I did. 10

Q. And as the result of that examination, did you determine what was his condition as to sobriety? A. I found that he was under the influence of liquor, after my examination of him.

By the Court:

Q. What time was that? A. At seven o'clock P. M. 20

By Mr. Walsh:

Q. What did your examination consist of? A. First of all, walking a straight line.

Q. What did he do? A. He waggled from side to side.

Q. Waggled? A. That is, he straggled from side to side. He did not walk straight. 30

Q. He didn't walk straight? A. He couldn't walk straight.

Q. He straggled? A. He straggled from side to side, as he tried to walk, and I put him through the stability test. The stability test is to have him put his feet together, with his arms out and his eyes tight closed, and if he stands a moment or two, he is not under the influence, but if he wiggles or is unstable, he will fall off his feet.

Q. What did he do? A. He was unable to stand still. 40

*Abraham H. Barr, for State Direct.*

Q. When you say he would fall off his feet, what do you mean? A. What I mean to say is that he will not be able to control himself, with his eyes tightly closed.

10 Q. What else did you do? A. I gave him the test of putting several fingers before him to see if he could count.

Q. How did he respond? A. He didn't respond very readily.

Mr. Crane: I move to strike that out.

The Court: Why?

Mr. Crane: I don't think it is an answer to the question.

The Court: The objection is overruled.

Mr. Crane: Exception.

20 Q. What other test did you make? A. I thought that was enough to convince me at the time that the man was intoxicated.

Q. You didn't put him through any other test? A. No, sir.

Q. How did you determine that he was suffering from the effects of intoxicating liquor? A. How did I discover it?

30 Q. Yes. A. His rambling talk, unable to stand straight—unable to perform the stability test; unable to walk a straight line.

Q. How did you satisfy yourself that that was from having imbibed intoxicating liquor? A. He had a very strong odor of liquor.

Q. A strong odor of liquor? A. Very strong.

Q. Did you talk with him at the time? A. I asked him several questions.

Q. You haven't described any questions; outside of giving him the orders. A. That is what I mean.

40

*Abraham H. Barr, for State Direct.*

Q. I mean, for the purpose of testing him, did you talk with him further than that? A. No, sir, I did not.

Q. Did he say anything at the time of that examination? A. He tried to tell me that he had had no drink at all.

10

*Cross-examination by Mr. Crane:*

Q. Doctor, you knew in advance of the defendant's being brought to your office that there had been an accident? A. I did not, no.

Q. You did not know it until he came in? A. No; they bring men to me often without my knowing anything except that I am called upon to attend to them.

Q. How about this case? A. They brought him down to the office without telling me anything about it. 20

Q. Had the police officer who came to your office with the defendant told you that at that time there had been an accident? A. At the time of the examination, I heard it.

Q. You mean that the police officer said so? A. Yes.

Q. The police officer also told you that the defendant was drunk, didn't he? A. No, sir.

Q. He didn't say anything about that? A. He did not. 30

Q. Did you make any other examination of the defendant other than you have testified about? A. I think that is all I did at that time.

Q. You didn't examine him to see whether he had been injured in this accident or not? A. I didn't know of any injury.

Q. Didn't he tell you that he was in this collision and that his head had hit against the dashboard? A. No. 40

*Abraham H. Barr, for State—Cross.*

Q. Didn't you observe an abrasion by the side of his face and on his temple? A. I don't remember it.

Q. Just stop and think. A. I don't remember, because I only saw this man once.

10 Q. Didn't he tell you that in this collision, when the motorcycle came into contact with his automobile, that he was forced—jammed out of the driver's seat and that he hit his knees up against the dashboard of the automobile? A. I don't remember anything of the kind.

Q. You made no examination of his knees, did you? A. I did not.

Q. You never met the man before, did you? A. I never did.

20 Q. You didn't know what his normal method of talking was, did you? A. I never met the man, so I couldn't tell you.

Q. Did you take his pulse? A. I did not.

Q. Why not? A. I didn't think that it was necessary.

Q. Did you take his heart count? A. It was not necessary.

Q. I asked you if you did. A. I did not.

30 Q. Wouldn't his pulse have indicated to you in a more scientific way that he was under the influence of liquor, if you had taken his pulse and you had shown that they were very rapid? A. You mean that by taking his pulse you could tell whether the man was under the influence of liquor?

Q. You never heard of that test, did you? A. I never tried it.

Q. The excessive use of alcohol does make the pulse more rapid, does it not? A. I am not prepared to say.

40

*Abraham H. Barr, for State—Cross.*

Q. As a physician, can you tell me that? A. Why, there might be an increase of pulse, but that wouldn't indicate whether a man was under the influence of liquor or not.

Q. I am asking you whether or not as a physician whether you don't know from the learning you have had and from your practice that the excessive use of liquor increases the pulse. A. I haven't gone into that. 10

Q. Does it increase the heartbeat? A. I never went into that.

Q. You never had any schooling on that? A. I never had occasion to go into it.

Q. What you found was that this man couldn't walk a chalk line? A. He couldn't walk straight.

Q. And that he talked differently from the way that normal people talk? A. True. 20

Q. And that he didn't stand up straight? A. Right.

Q. And what else? A. His actions all around.

Q. What else about his actions? A. The test I put him through and his rambling talk and the odor of liquor on his breath. He had a very strong odor.

Q. Now, Doctor, if this man had not had the odor of liquor on his breath, from these symptoms which you say you found in his case, would you have pronounced him under the influence of liquor? Yes, or no? 30

The Court: That is, without the odor of liquor, and confining yourself to all these other symptoms, would you have pronounced him under the influence of liquor?

A. The other symptoms would not appear at the time, then.

*Abraham H. Barr, for State—Cross.*

Q. The other symptoms? A. I say, that these symptoms would not have appeared at the time.

Q. Unless he had been under the influence of liquor? A. Absolutely.

By the Court:

10

Q. You mean that all of them together would not appear? A. They would not appear together.

Q. Unless he was absolutely under the influence of liquor? A. No.

By Mr. Crane:

20

Q. Do you mean to say that a man might not be of unsteady gait and not talk normally and not stand up straight and not be under the influence of liquor? A. That depends upon his own physical condition.

Q. What did you know about this man's physical condition? A. Nothing.

By the Court:

Q. Except what you saw? A. That is all.

Q. You saw the man? A. I saw the man.

30

Q. Was there anything the matter with his physical condition? A. Nothing; except, as I stated—when he came in he was very boisterous and loud-talking and was unable to answer my questions.

Q. When we speak of physical condition, can you tell now, by looking at me and at these jurors, what my or the jurors' physical condition is? A. Well, he was not his normal self, then.

Q. I am asking you if you could see his physical condition. You saw the man there? A. Yes.

Q. His physical condition was normal, was it, outside of these things? A. It was.

40

*Abraham H. Barr, for State—Cross.*

By Mr. Crane:

Q. If you had known, or if you had inquired and found out that in this accident this defendant did have his knees hurt and had received a blow on the head and on the chest, would you have considered those facts in diagnosing the case? A. Depending upon whether he had any liquor at all. 10

Q. If he had had a smell of liquor on his breath, you would not have given these symptoms any consideration in the diagnosis of the case? A. My diagnosis of the case, as I said, was that he was under the influence of liquor.

Q. Won't you please answer the question I asked you? Then, as I understand your testimony, Doctor, it is that if he had had the odor of liquor on his breath, you would not have considered any other symptoms such as the fact that he was injured in this accident, in forming your diagnosis of the case? 20

The Court: Who said he was injured?

Mr. Walsh: There is no such testimony, as to whether the man was injured or not.

The Court: There is nothing before me to the effect that the man was injured. You are putting it in the form that he was injured. If you want to put a hypothetical question, put it. 30

Q. Assuming that the defendant was injured about the legs, about the chest, and about the head, three quarters of an hour before you made your examination of him, would you have considered those facts? That is, the fact that he had been injured, in forming your opinion as to whether or not, from what you saw of him, he was under the influence of liquor. A. Would I have considered it? 40

*Abraham H. Barr, for State—Cross.*

Q. Yes. A. Naturally, I would have considered that if the man had mentioned the fact that he was injured, but there was no mention of the fact that he was injured.

10 Q. Assuming that he was injured, as I have indicated in my former question, would you still have said that he was under the influence of liquor? A. Yes, sir.

Q. Now, then, Doctor, as I take it from your testimony, the unfailing test that you use is the stability test. Is that right? A. That is an important test, yes.

Q. It is a test that you would be guided by all the time? A. Yes.

20 Q. And this test consists of having the patient stand erect, with his feet together, holding out his arms, thus (indicating), and closing his eyes? A. Right.

Q. And if, after standing there for one minute— A. (interrupting) It depends upon—

Q. (interrupting) I am talking about your testimony. A. Yes, sir.

Q. There is a swaying of the body? A. True.

Q. And that is an indication of intoxication? A. Yes, sir.

30 Q. Will you stand down here in front of the jury-box, please? Will you face the jury, and will you put your feet together?

Mr. Walsh: I object to a demonstration by the doctor. I submit this is not proper cross-examination.

The Court: What do you object to, Mr. Prosecutor? What is the ground of the objection?

Mr. Walsh: I don't think it is within the bounds of cross-examination.

*Abraham H. Barr, for State—Cross.*

The Court: You find no fault with the question itself?

Mr. Walsh: No.

The Court: Do you recall that, that the doctor said that if a man couldn't stand for one minute in that position—if he swayed, he was intoxicated? 10

Mr. Walsh: No, sir.

The Court: That is the question that counsel is putting.

Mr. Walsh: I object to the form of the question.

The Court: If the ground of the objection is on that basis, what is there in this testimony which would warrant your question on cross-examination, put as it is? 20

Mr. Walsh: I don't recall the doctor's having said that.

The Court: That if a man stands in the position you have indicated, for one minute, and sways, the doctor's testimony was, as I recall it, that he found the defendant to have been under the influence of liquor, because he staggered when he walked, because he was unstable with his eyes shut and with his feet close together, and because he couldn't count fingers when they were put up before him, very readily, and because he rambled when he talked, and because he had a very, very strong odor of liquor on his breath. 30

Mr. Crane: He didn't say that he had a very, very strong odor.

The Court: Well, a very strong odor. We will leave one "very" out; and all of these things together, he said, were the things which led him to the diagnosis that 40

*Abraham H. Barr, for State—Cross.*

10 the man was under the influence of liquor, and not as you put it in these questions. You are singling this out of the things which, together with others, made him conclude as he did. Therefore the question, if the Prosecutor objects to it on the ground that it is not his testimony, and therefore is something put in his mouth that he didn't say, the objection will be sustained.

Mr. Walsh: I have introduced that objection.

20 The Court: The question as put here, if he will have it read—if you want it read—is, as I recall it, that if a man stands in the position for a minute—there is no such testimony.

Mr. Crane: I may have misquoted the testimony; I may not have given the testimony accurately, and I am going to try the question again from what I have as the testimony.

By Mr. Crane:

30 Q. Doctor, didn't you testify on your direct examination to the effect that you applied the stability test to the defendant in making this examination? A. I did.

Q. And didn't you say that the so-called stability test consisted of having the defendant stand with his heels together, his arms out, and his eyes closed? A. Yes, sir.

Q. And didn't you also testify that if a person stood in the position I have indicated, for a minute or two, and swayed, that it was a sign of intoxication? A. That is only one symptom.

40 Q. Didn't you so testify? A. That was my mistake; it should go in with the other symptoms, if

*Abraham H. Barr, for State—Cross.*

I did present it that way, because that one symptom is not enough.

Q. Wouldn't a normal person have swayed? A. A normal person would have some sway, but an intoxicated person, an exaggerated sway.

Q. You didn't mean that, then? A. I mean what I said now. 10

The Court: I want to give you all the opportunity you should have to cross-examine. I want you to have the opportunity, because it is important—extremely important, in this case, in both ways.

Mr. Crane: I think we had better refer to the notes.

The Court: As to what?

Mr. Crane: Because my recollection is that this witness said positively on his direct examination by Mr. Walsh that he had applied this stability test— 20

The Court (interrupting): He did.

Mr. Crane: And that that was an un-failing index, or words to that effect, of intoxication.

The Court: You are making it stronger. He testified nothing about its being an un-failing index. I will stand or fall as the Trial Judge on my recollection. If I am wrong, I can be corrected. 30

By Mr. Crane:

Q. It is my recollection of the testimony that you testified on your direct examination that what you call the stability test was one of the observations that you made—that it was one of the outstanding reasons why you said that this man, in your opinion, was intoxicated. Is that so? 40

*Abraham H. Barr, for State—Cross.*

The Court: You may answer if it was one of the outstanding reasons.

A. Yes, sir.

10 Q. And I also recollect from your testimony that you said that when the test was applied, that if a man stood in that position for a minute or two, and swayed, it was evidence that he was intoxicated.

Mr. Walsh: I object to that.

The Court: Objection overruled.

A. Unless he had liquor in him.

20 Q. And I also understand your testimony to be that a normal person not under the influence of liquor, submitted to that test, would not sway. Is that right? A. Well, he will sway—

The Court (interrupting): He never said anything of the kind—that he would not sway. He said that he will sway.

Mr. Walsh: That he will sway some.

30 The Court: He has already explained that before by saying that the sway would be exaggerated in the case of an intoxicated person and that there would be some sway in a normal person.

Q. How did this play any part in arriving at your conclusion that this man was under the influence of liquor?

The Court: I assume that by “this” you mean the swaying?

A. He was unable to stand still. He had to move his foot in order to stand still.

40 Q. What? A. I mean to balance himself.

*Stephen Steele, for State—Direct.*

Q. Doctor, you said that his talk was rambling?

A. Yes, sir.

Q. What was it about? A. I don't remember just now.

Q. You don't remember anything he said to you, do you? A. I can't recall what he said then.

10

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STEPHEN STEELE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

*Direct examination by Mr. Crane:*

Q. You are a physician practicing in Elizabeth?

A. No—In Linden.

20

Q. And on the night of October 16th did you go to the Police Headquarters at Linden? A. Yes.

Q. In response to a telephone call which you had received? A. Yes.

Q. And when you got there, did you see the defendant, Charles Oliver? A. Yes, sir; I examined him.

Q. You made an examination of him? A. Yes, sir.

Q. What was the purpose of that examination?

A. The purpose was to find out whether he was intoxicated or not.

30

By the Court:

Q. What time of night was it? A. I think it was half past eight.

By Mr. Crane:

Q. And after you had made your examination, did you form an opinion as to whether he was intoxicated or not? A. Yes.

40

*Stephen Steele, for State—Cross.*

Q. And what opinion did you form? A. I formed the opinion that he was not intoxicated.

Mr. Crane: Take the witness.

*Cross-examination by Mr. Walsh:*

10 Q. That was at half past eight? A. About half past eight.

Q. You found out he had been drinking? A. Yes—that he admitted himself; that he was drinking.

Q. Drinking intoxicating liquor? That he had been, in the late afternoon and early evening, drinking intoxicating liquor?

Mr. Crane: I object to the question.

20

The Court: That is objectionable.

Q. He admitted that he had been drinking intoxicating liquor? A. Yes.

Q. Did he say when he had been drinking that? A. I did not ask him that question; he didn't tell me.

Q. He had the odor of liquor on his breath? A. He had, yes.

Q. Did you put him to a test? A. Yes, sir, I made several tests.

30 Q. What were those tests, Doctor? A. They were tests about the same as Doctor Barr's; I let the patient walk in a straight line and stand with closed eyes and let him touch his nose with one of his fingers.

By the Court:

Q. Show the jury how that is done. A. He extends his finger and goes slowly and touches his nose.

40

Mr. Walsh: That was another test.

*Stephen Steele, for State—Cross.*

Q. His nose—not part of his face? A. He touches the point of his nose.

Q. You asked him to touch the point of his nose? A. Yes.

Q. I always understood it was the tip of the nose? A. Yes.

10

By Mr. Walsh:

Q. Was there any other test, Doctor, that you put him through? A. I told him to extend his hand and show his tongue. I think that was all.

Q. What did these tests show you at the time? What did he do? A. He did all these tests as a normal person would do.

Q. You are his family physician, are you? A. No, I am not.

20

Q. That was just about half past eight? A. About half past eight.

Q. Might it have been ten minutes to nine o'clock on the evening of October 16th? A. It might be that was the correct time. I don't remember very well.

Q. You don't remember what time it was—the exact time of the examination? A. I think it was between eight and nine o'clock, yes.

Q. It was nearer nine, was it not? A. Probably it was. I cannot remember very well.

30

Q. Did you find evidence of his having been under the influence of intoxicating liquor? A. I beg pardon?

Q. When you examined him, you could tell that he had been under the influence of liquor, could you not? A. Yes.

Mr. Crane: I object to that question.

The Court: Why?

Mr. Crane: Because there is nothing in 40

*Stephen Steele, for State—Cross.*

the direct examination which would warrant such a question.

10 The Court: There is the doctor who says that he was under the influence of liquor, at seven o'clock, and this doctor says he admitted having drunk liquor and he says that he smelled the liquor.

Mr. Crane: Yes.

The Court: Now, the question is whether he could tell from his examination—on cross-examination—whether he had been under the influence of liquor.

20 Mr. Crane: I object to the question further because to have any material bearing it must have been within a few hours. I object to the question whether the man had ever been under the influence of liquor.

The Court: Is it not a fact, and do not the courts hold, that to tell whether a person is under the influence of liquor does not require expert testimony?

Mr. Crane: Yes; but it does not say whether or not you or I can tell whether a man has been under the influence of liquor some time before.

30 The Court: They haven't gone that far yet, but I imagine that some day they will; and somebody must take the lead, and I am willing to start it, to have a try-out, as to whether he could tell if a person had been under the influence of liquor, but I expect the Prosecutor, if he answers yes, to ask when and how. I will allow it on cross-examination.

40 Mr. Crane: Exception. I object to the Prosecutor's question and the Court overruled my objection, and I take an exception. I ask to have the question read.

*Stephen Steele, for State—Cross.*

Q. (Repeated by the stenographer as follows):  
 “When you examined him, you could tell that he  
 had been under the influence of liquor, could you  
 not?” “A. Yes.”

The Court: Do you move to strike the  
 answer out? 10

Mr. Crane: I now move to strike the  
 answer of the witness from the testimony.

The Court: I will deny the motion and  
 allow you an exception.

Q. How long before your examination would  
 you say that he had been in an intoxicated con-  
 dition?

Mr. Crane: I object to the question. 20

Q. You said that you found that he had been  
 intoxicated—

The Court: (Interrupting) You are not  
 helping anybody by this kind of thing. You  
 are not giving the man a chance to answer,  
 or the Court chance to rule.

Mr. Walsh: I ask that that last question  
 be stricken from the record.

The Court: Strike it out. Now, Mr.  
 Crane, what is your objection to this ques- 30  
 tion?

Mr. Crane: This witness has not testified  
 that he found that this man was ever in-  
 toxicated. On the contrary he says that he  
 found he was not intoxicated.

The Court: That is your objection?

Mr. Crane: Yes.

The Court: The objection will be over-  
 ruled, and I will allow you an exception. 40

*Stephen Steele, for State—Re-direct.*

Q. (Repeated): "How long before your examination would you say that he had been in an intoxicated condition?" A. I did not find any evidence that he was intoxicated.

10 Q. Didn't I ask you about that, and didn't you state that you could tell that he had been intoxicated? A. I misunderstood the question.

Mr. Crane: He said no such thing, according to my recollection.

The Court: Well, that is mine, and that is going to stand. Can you answer this question that has just been asked?

The Witness: No, I can't.

By the Court:

20 Q. You cannot tell? A. No.

Q. The answer is that you cannot tell? A. No, I can't tell.

*Re-direct examination by Mr. Crane:*

Q. Did I understand you to so testify—that it was your opinion that this man had been intoxicated? A. No, it was not.

30 Q. On the contrary, it was your opinion that he had not been intoxicated? A. Well, he was not intoxicated at the time of my examination.

Q. From your examination, could you say whether the defendant had been intoxicated or not? A. No, I could not.

Q. You had never met the defendant before that night, had you? A. No, sir.

Q. You never saw him before? A. No.

Q. And you knew nothing about him? A. No.

*Mrs. Margaret Fitzpatrick, for State—Direct.*

AFTER RECESS

Appearances: Same as before.

MRS. MARGARET FITZPATRICK, sworn as a witness on behalf of the State, testified as follows: 10

*Direct examination by Mr. Walsh:*

Q. Mrs. Fitzpatrick, you are the widow of Edward Fitzpatrick? A. Yes, sir.

Q. He was a park policeman? A. Yes.

Q. When did he die? A. October 17th, 1928.

Q. When was he buried? A. October 20th, 1928.

Q. Where was he buried? A. He was buried in Linden. 20

Q. How long have you been married?

Mr. Crane: I object to that.

Mr. Walsh: It is simply for the purpose of identification.

The Court: I don't see that it makes any difference.

(Question withdrawn.)

By the Court:

Q. How old a man was he? A. Twenty-seven. 30

The Court: As I understand it, you will stipulate that this was the body?

Mr. Crane: Can't we stipulate that? Dictate your stipulation.

(It will be stipulated that Edwin Fitzpatrick was taken from the scene of this collision in Linden to St. Elizabeth Hospital, on October 16th, where he died on October 17th; that his body was taken from St. 40

*Elmer R. Vreeland, for State—Direct.*

10 Elizabeth Hospital to Martin's Morgue, where an autopsy was performed by Doctor Horre; that the body was, after the autopsy, turned over to Undertaker Higgins, of this City, and taken to his home, and later from there interred in the Linden Cemetery.)

Mr. Walsh: I have several photographs which Mr. Crane has inspected, and I now offer them in evidence and ask that they be marked, without the offering of proof.

The Court: If they are agreed to, let us have them in evidence.

20 (No objection being offered, the photographs referred to are marked Exhibits S-1 to S-8, inclusive.)

The Court: I understand it is agreed that the view S-8 shows St. George Avenue and Lincoln Highway, looking west, and that Exhibit S-7 shows St. George Avenue and Lincoln Highway looking east.

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30 ELMER R. VREELAND, a witness called by the State, having been first duly sworn, testified as follows:

*Direct examination by Mr. Walsh:*

Q. Where do you live? A. Rahway.

Q. Where, in Rahway? A. Meadow Avenue.

Q. What is your occupation? A. Bookkeeper.

Q. On the 16th of October last, at about a quarter after six, where were you? A. In Linden.

Q. And on what street in Linden? A. St. George Avenue.

40 Q. How were you travelling? Were you walking, or what? A. I was driving a car.

*Elmer R. Vreeland, for State—Direct.*

- Q. Whose car? A. My father-in-law's.
- Q. Who was with you? A. My father-in-law.
- Q. Now, in what direction were you going? A. Toward Rahway.
- Q. And what kind of a car were you driving? A. An Auburn.
- Q. And was your attention attracted by anything unusual happening there? A. Yes, sir. 10
- Q. What first attracted your attention? A. The loud sound of a crash.
- Q. And where was this crash? A. Right in front of me.
- Q. Explain how it was in front of you. A. It was to the front, and to the left, of me.
- Q. And what was in front of you? A. A Studebaker car.
- Q. Driven by whom? A. By Charles Oliver. 20
- Q. Do you see Charles Oliver in the courtroom? A. Yes, I do.

By the Court:

- Q. When you say in front of you, do you mean going in the same direction which you were, or coming towards you? A. Going in the same direction I was.

By Mr. Walsh:

- Q. And where is Charles Oliver in the courtroom? A. Sitting over there (indicating). 30
- Q. What you mean is at this counsel's table? A. That is right.
- Q. And a little to the left of you and to the front of you was Charles Oliver's car? A. That is right.
- Q. What did you see? A. I saw a cloud of dust go up and I saw a man slip off of the hood of 40

*Elmer R. Vreeland, for State—Direct.*

Charles Oliver's car right in front of us and when we drove a little ways and got him in the headlights of my car, then we went up to see if we could do anything, and when we got there, we found that it was an officer, and my father got out and stopped a car to take him to the hospital.

10 Q. And how far away were you when you saw this man's body fall from the hood of the car to the street in front of you? A. About twenty-five feet in back of him.

Q. And you drove on until you got how close to it? A. About ten feet away from him.

Q. What is your father-in-law's name? A. Harry Knierim.

20 Q. After bringing your car to a stop, what did you do? A. I got out to see if I couldn't help him in some way and we saw that we could not do anything, and tried to stop a car to take him to the hospital.

Q. Another car? A. Yes,—coming another way. We couldn't turn around, ourselves.

Q. As you brought your car to a stop, where was the Studebaker sedan? A. On my left.

Q. And was that in the middle of the street? A. Approximately in the middle, yes.

30 Q. And after going over to this police officer and attempting to stop a car, did you go back to the Studebaker sedan? A. We started to drive away, when we could not do anything else.

Q. Who was in the Studebaker sedan when you got to it? A. Nobody.

Q. Where was Mr. Oliver, if you know? A. I don't know.

Q. In other words, the car was in the middle of the street, and nobody was in it? A. That is right.

40 Q. Did you drive it away? A. No, I did not.

*Elmer R. Vreeland, for State—Direct.*

Q. What was done with it? A. I don't know; when we left, it was still there.

Q. How did you leave? A. I drove my car away.

Q. You drove your car away? A. I drove my car away, yes, sir.

Q. Where was the officer at the time you drove away? A. He was taken to the hospital. 10

Q. Before you left? A. Yes, sir.

Q. How was he taken to the hospital? A. In another car.

Q. In another car? A. Yes.

Q. How long after he was taken away in this other car did you remain? A. About half an hour.

Q. And during that time did you see Mr. Oliver? A. Yes. 20

Q. Again? A. Yes.

Q. Where did you see him? A. Why, he got in his car to drive it away.

Q. Did he drive it away? A. He did not.

Q. He got in the car? A. Yes, sir.

Q. After getting in the car, what did he do? A. He was going to drive it away, and somebody told him he had better not.

Q. Then what happened? A. He stayed there for a few minutes smoking a cigarette, and then he got out of the car again. 30

Q. Where did he go? A. I don't know.

Q. Did you have anything to say to Mr. Oliver at that time? A. I didn't say anything to him.

Q. Did anybody else while you were there? A. Yes, somebody else told him he had better not drive the car away.

Q. Did he make any answer? A. Not that I can remember.

Q. Did he say anything while you were there? 40

*Elmer R. Vreeland, for State—Direct.*

A. He said something about its being the officer's fault; that he was not to blame.

Q. Did he say anything else? A. That is all.

Q. Did you notice anything about his condition? A. Yes, I did.

10 Q. Did you notice anything about his condition as to sobriety? A. I noticed that he didn't seem to have—I might say that he didn't seem to have good control of himself.

By the Court:

Q. That is your conclusion. Tell us what you saw and we will decide whether or not he didn't have control of himself. Just tell us what you saw. A. I don't remember anything I saw, except that when I saw him, he was sitting behind  
20 the wheel and smoking a cigarette.

Q. What caused you to say that he didn't seem to have any control of himself? A. He didn't act right. I don't just recall his actions.

Q. That doesn't mean anything. If you don't recall his actions, say so. A. I don't recall his actions.

By Mr. Walsh:

30 Q. You don't recall anything he did there? A. No, I don't; outside of smoking a cigarette.

Q. Didn't you see him walk? A. No, sir.

Q. Was there any car between you prior to the accident? Was there any car between you and Oliver's car? A. No, sir.

Q. Was your attention attracted to his car before the accident? A. Somewhat.

Q. In what way? A. Why, he had passed us a way back.

40 Q. What did you notice as he passed you? A.

*Elmer R. Vreeland, for State—Direct.*

I had to keep my eye on him to see that he didn't cut in too short on me.

Q. Why? A. No special reason; just to make sure I wouldn't get shifted off the road.

Q. Was there anything about his driving the car that caused you to have undue caution? A. No, sir. 10

By the Court:

Q. You were doing that for safety? A. Yes.

Q. So as to be sure that nobody would push you off the road? A. Not only that; but I keep my eye on them, you see.

By Mr. Walsh:

Q. How far back from the point of the crash was it that he passed you at that time? A. About two hundred feet. 20

Q. Did you notice the operation of his car right ahead of you? A. Nothing; except that he started to cut in in the usual way; that is, I mean to pass me in the right way; he didn't cut in short or anything. He came in gradually, outside of me.

Q. And after he came in, he traveled ahead of you? A. He did. 30

Q. On which side of the street? A. On the left-hand side of me. On the same side that I was.

Q. With relation to the center of the road, where was he? A. He was just about on the center of the road; that is, the left side wheel was out about the center of the road.

Q. Was there any traffic on the Avenue that night? A. Not much.

Q. How many lines of cars were there going on the right-hand side—going down? A. Going down on the right-hand side? 40

*Elmer R. Vreeland, for State—Cross.*

Q. Yes. A. The one I was in; that is all.

Q. And that was the one nearest the center?

A. No; nearest the inside.

Q. And there was no other line? A. No other.

Q. You didn't see the officer before you saw his body roll off the hood? A. No, sir.

10 Q. Did you notice the traffic going toward Elizabeth? A. No.

Q. You did not notice that at all? A. No, sir, I did not.

Q. You don't know whether there were any cars on your left-hand side coming towards you, do you? A. No, I do not.

Q. What I understand you to say is that you were the one who told Oliver not to drive away?

20 A. I didn't mention the fact to him; but someone else did.

Q. When Oliver got in the car to drive it away, where were you? A. Standing alongside of his car.

Q. Close to him? A. Why, I had my head inside of the window.

Q. Did you smell anything? A. I did.

Q. What did you smell? A. Liquor.

Q. Were the windows down in Oliver's sedan?

A. They were.

30 Q. And which door did you have your head in?

A. The front one on the side furthest from him.

Q. How fast was Oliver traveling at that time, if you know? A. About twenty-five miles an hour.

Q. At the time of the accident? A. Yes.

Q. How fast were you traveling? A. Twenty-two—between twenty-two and twenty-five.

*Cross-examination by Mr. Crane:*

40 Q. After Mr. Oliver's car passed your car, how far did you follow it before this impact took place?

A. About two hundred feet.

*Elmer R. Vreeland, for State—Cross.*

Q. And during the two hundred feet that you were following the car that was in front of you, was there anything about the operation of the car that attracted your attention to it? A. No, there was not.

Q. And the car that was immediately ahead of you—Mr. Oliver's car, was in the place where it should have been on the side of the center of the road? 10

Mr. Walsh: Objected to as calling for a conclusion. He may ask which side of the road, but whether he was where he should have been or not—that is a conclusion.

The Court: Well, the witness can remember whether it was where it should have been or not. 20

Mr. Walsh: I submit that would be a conclusion.

The Court: This is an intelligent witness, and he can grasp the import of the question.

A. I should say yes, to that.

Q. And Oliver did not zigzag as he went up the street, did he? A. He did not.

Q. And when this crash came, what did you do about the operation of your car? A. I immediately tried to stop, but it happened so quickly, and I saw the body roll off so quickly I thought that it would be best to ride up a little and get him in the rim of my light. 30

Q. Did you notice how far the Oliver car proceeded on before it came to a stop? A. No, I did not notice exactly.

Q. It would take him about the same distance to stop that it did you? That is what I am getting at. A. I couldn't say that. 40

*Elmer R. Vreeland, for State—Cross.*

Q. Now, then, when you got out of your car and went up to the Oliver car, did you look at the front of the Oliver car? A. I did.

Q. What did you see when you looked at the front of the Oliver car? A. I saw a motorcycle underneath it, and the radiator all smashed in.

10 Q. Where was the motorcycle with reference to the front of the automobile? In other words, had the Oliver automobile passed over it? A. No, it had not.

Q. I show you exhibit S-1, which is a picture of the Oliver automobile as it appeared after the accident. Is that the way you saw it? A. That is right.

20 Q. I show you another picture of the automobile, exhibit S-6, and I ask you if that also represents a view of it. A. It does.

Q. And I show you exhibit S-5, which is another picture from another viewpoint, and I ask you if that is also a view of it. A. It is.

Q. And I ask you the same question as to exhibit S-4. A. That is right.

Q. Were you able to see what part of the motorcycle was damaged? A. Yes.

30 Q. I show you a picture—exhibit S-2, and I ask you if that fairly represents the condition of the motorcycle at the time of the accident, as you saw it. A. It does.

Q. With relation to the center of the road, where was the motorcycle when you saw it immediately after the collision in front of the Oliver car—on the north or the south side of road? Do you know which is the north side? A. The north is toward Elizabeth.

40 Q. St. George's Avenue runs generally east and west; going west the right hand would be to the north, and to the left, to get to the south? A. That is right; it was on the north side.

*Elmer R. Vreeland, for State—Cross.*

Q. And that was on the side of the road that you were traveling on? A. That is right.

Q. And how far was the motorcycle from the center of the street? A. I would say about a foot.

Q. You didn't know at that time—at the time of the happening of the accident, who was driving the automobile in front of you, did you? A. No. 10

Q. And after you had assisted in seeing that this unfortunate policeman was taken to the hospital, you then went to the Oliver car, didn't you? A. Yes.

Q. As I understand your testimony, there was no one in it then? A. There was no one in it right after he hit him; when we got there, there was no one in it. 20

Q. And some time later, Oliver came from the crowd assembled there, and got in the automobile? A. I don't know whether he came from the crowd. He got in the automobile; must have come from the crowd. 20

Q. Between the time you were there and the time that Oliver got into the car, did many people come to the scene of the accident? A. I don't get that.

Q. I say, between the time that the accident happened, and the time that you saw Oliver get in the car, did a number of people stop there at the scene of the accident? A. They did. 30

Q. While the automobile stood in the position where it was—I am talking now of the automobile and the motorcycle, where it was immediately after the accident, did the traffic pass to the east towards Elizabeth? A. Rahway.

Q. The cars came along that side of the street? A. They did.

Q. And when you left the scene of the accident, 40

*Elmer R. Vreeland, for State—Cross.*

to go to your home in Rahway, was the automobile of Oliver still there? A. Yes.

Q. And the motorcycle? A. The motorcycle was pulled to the side of the road.

Q. What did you do about passing down the road toward Rahway? A. I passed, to the right of him; to the inside.

10 Q. To the inside? A. Yes.

The Court: How wide do you agree Rahway Avenue was on the date of the accident, at the point where the collision took place?

Mr. Crane: I think we can agree that the road is a thirty-foot road—the improved surface. That the improved part of the road is thirty feet, about, with a seven-foot shoulder on each side.

20

The Court: That is agreed to?

Mr. Crane: Yes.

Mr. Walsh: Yes.

Q. When Mr. Oliver got in his car, you say he was going to drive away. You didn't mean just that, did you? A. I did, yes.

Q. Was he going to drive the car out of the traffic? A. I don't know. He stepped on the starter, and tried to start it.

30

Q. And some one of the people there in the crowd said, "Don't drive your car away. Leave it right where it is until the officers see it," or words to that effect? A. They did.

Mr. Crane: That is all.

40

*Harry Knierim, for State—Direct.*

HARRY KNIERIM, a witness called by the State, having been first duly sworn, testified as follows:

*Direct examination by Mr. Walsh:*

Q. You are the father of the last witness on the stand? A. I am his father-in-law. 10

Q. Were you with him in Linden on October 16th about 6:15 o'clock? A. Yes.

Q. Where were you riding? A. We were going home.

Q. What were you riding in? A. In a car.

Q. Your car? A. Yes, sir.

Q. On what side were you riding? A. I was sitting on the right, in the front seat, alongside of my son-in-law. 20

Q. Are you familiar with St. George Avenue at that point? A. Well, yes; I lived there, in Park Avenue, for years—that is a little above—until here this fall. It happened right this side of Thompson Avenue.

Q. I show you Exhibit S-8, and I ask you if you remember that section of St. George Avenue? A. Yes.

Q. That is St. George Avenue looking west? A. Looking toward Rahway; looking west. 30

Q. I show you Exhibit S-7, and I ask you if you are familiar with that? A. Yes; that is looking east. There are billboards on the opposite side of the street.

The Court: Can't you mark on one of these photographs an "X" about where you can concede the accident happened?

The Witness: It was right in about here, I think—above this stand. It was a short distance this side of Thompson Avenue. 40

*Harry Knierim, for State—Direct.*

The Court: I don't mean for you to mark it. Point with respect to the center or side of the street about where the accident occurred, by reference to some house.

The Witness: I think about in front of that house there (indicating).

10

The Court: Well, mark it.

The Witness: It was a short distance this side of Thompson Avenue.

(The witness marks the place with a pencil.)

The Court: This, you will understand, Gentlemen of the Jury, from the witness, does not mean that it happened on that spot in the pavement, or anything of that kind, but about where it happened on the avenue.

20

The Witness: Of course, if I were out there, I could show you.

The Court: I understand.

Mr. Walsh: But you can't tell just exactly.

Q. You were riding with your son-in-law? A. Yes.

30

Q. Was your attention attracted by anything? A. By a crash in front of us—a terrific crash.

Q. Had you noticed anything before that? A. No, sir.

Q. And on which side of the street was your son-in-law driving? A. The right-hand side, going out.

Q. Was there any car in front of them? A. Yes, there was a car ahead of us.

40

Q. Was the car ahead of you nearer the center of the street than you were, or nearer the curb? A. Yes, sir, it was a little bit to the left of us.

*Harry Knierim, for State—Direct.*

Q. Was there any car directly in front of you?

A. No, sir; no car between.

Q. Was there any car between the car that was traveling a little to the left of you—in front of you—and the curb? A. No, sir.

Q. Then you say your attention was attracted by a crash? A. Yes, sir. 10

Q. Was it dark at that time? A. Oh, yes; we had our lights lit.

Q. And when your attention was attracted by this crash, what did you see? A. Well, I saw an object going up through the air.

Q. Going up through the air? A. In the front of this sedan; and it struck on the sedan and slid off right to the highway and when we turned—he says we will drive off of the road, and he drove to the side and stopped, and when we turned, our lights showed a man lying on the highway. 20

Q. Was he on the improved surface of the highway? A. Yes, and we were off the highway on the dirt and we didn't go up as far as the man lay.

Q. How near the edge of the concrete, or improved highway, did his body lie? A. I should judge his head was about eighteen inches from the running board of the car.

Q. Of the car? A. The sedan.

Q. The Studebaker Sedan from which it had rolled? A. Yes; and he laid right direct—straight from the car,—and his feet were still on the highway. He lay straight on his back, and his arms stretched out (indicating)—that way. 30

Q. How far beyond the point of the crash was that, Mr. Knierim? A. What?

Q. How far beyond the point of the crash was it that he was lying this way?

Mr. Crane: I object to that question. I don't remember that that was the situation, as the evidence showed it. 40

*Harry Knierim, for State—Direct.*

The Court: What difference does it make?

Mr. Oliver: He jammed the righthand side of the hood—where he struck the righthand side.

10 The Court: What difference does it make how far away it was?

Q. How far did the car ahead of you—the Oliver car—travel, after you heard the crash, if you know? A. I should say he went close on to fifty feet.

By the Court:

20 Q. After the crash? A. After the crash it was a kind of a dust from scraping, or shoving the machine along; there was a kind of dust raised up, and the glass from the motorcycle light was about forty feet back on the roadway—back of his car, afterwards.

Q. In other words, after the Studebaker, or the Oliver car—

Mr. Crane: (interrupting) I object to the Prosecutor's leading the witness.

30 The Court: Yes, the witness said that after the crash the Studebaker traveled about fifty feet from the place where he heard the crash and described the motorcycle as some fifty feet from where the car stopped.

By Mr. Walsh:

40 Q. Did you see Mr. Oliver there that night? The defendant, that is, there? A. I wouldn't say it was him, but I saw the man come back and get in the car.

*Harry Knierim, for State—Direct.*

Q. Did you see him leave the car? A. Well, I started to come up—can I explain this thing to him, your Honor?

The Court: It is a simple question. Did you see this man there?

The Witness: Yes, I saw the man in the car. I wouldn't identify him as that man. 10

Q. Did you see anybody leave the Studebaker car? A. Yes.

Q. But you are not able to identify who it was? A. No; I didn't go up to the car; my son-in-law went up.

Q. You stayed in your car? A. Yes; and then when he stayed, I got out of the car, and I thought I would go up, because the officer— 20

The Court: (interrupting) No — you can't tell that.

Q. You went up? A. I went up; but before I got there, he was gone.

By the Court:

Q. Who was gone? A. The man in the car—that got in the car and tried to start it.

Q. Did you see the man who got in the car? 30  
A. Through his rear glass; through his glass from my car—from the light. It showed right in. He lit a cigarette.

By Mr. Walsh:

Q. Then you went up to his car, did you? A. No; when he was gone we came back, because we promised the officer to meet him across the way from the garage.

Q. You came back to your car? A. Yes. 40

*Harry Knierim, for State—Cross.*

Q. How long after the collision did you stay there? A. Oh, we stayed there quite a while, because we were waiting there until the officer came.

Q. Do you know the officer that came? A. He was a Linden officer.

10 Q. What had become of the police officer who had been thrown on the street? A. After I got out of the car, I leaned over, and said—

Q. (interrupting) No—just tell us what you did. A. We picked him up and put him in the car.

By the Court:

20 Q. You picked him up and put him in a car, and he was driven away? A. Picked him up, and I stopped a car.

By Mr. Walsh:

Q. And he was driven away? A. Yes.

Q. As you and your son-in-law left that place, where was the Studebaker car? A. In the roadway.

Q. What part of the roadway? A. Out in the center.

30 Q. Was anybody in it at the time that you left? A. No, sir.

Q. Then you went home, or went to Rahway? A. Went to Rahway.

Mr. Walsh: That is all.

*Cross-examination by Mr. Crane:*

Q. Did you notice the Studebaker car in front of you before this crash? A. Well, we saw a car in front of us.

40 Q. And it was going along at about the same

*Harry Knierim, for State—Cross.*

rate of speed that you were going? A. I would say about the same.

Q. The car in front of you was on the right side of the road? A. It was pretty near to the center. It was more to the left than we were, and we were just about on the righthand side.

Q. At the time that this crash came and you saw this dust, were there other automobiles coming east towards Elizabeth? A. Not that I saw. 10

Q. So far as you could see, there was nothing on this side of the road? A. Not that I noticed at that time; the first I noticed was afterwards.

Q. You said something about somebody's going away before you got to the car? A. Yes.

Q. You don't mean that the defendant went away? A. The party that got in the car and tried to drive it away before got out of the car and left before I got up there. 20

Q. You mean he tried to drive away? A. He lit a cigarette and you could see the wheel.

Q. Yes; but you don't know whether he tried to start the car?

Mr. Walsh: He saw the man get in the car, however.

Mr. Crane: He might see a lot of things.

Q. I am asking you if you, of your own knowledge, know that he tried to start the car. A. I wouldn't say that; because I could not see his feet. 30

Q. What you saw was that he got in the car and lit a match, and from it, lit a cigarette? A. Yes.

Q. He didn't drive the car away? A. No, sir.

Q. He didn't move the car, did he? A. I don't think he could.

Q. Won't you please tell us why you told the jury that he tried to drive away? A. It is natural, when a man gets in a crowd, and is in the 40

*Harry Weitzman, for State—Direct.*

direction that he wants to go, that he should want to drive away.

Q. That might be what he wanted. But I want to know how you know. A. Well, that was the conclusion I came to; that is all.

10 Mr. Crane: That is all.

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HARRY WEITZMAN, called as a witness by the State, being first duly sworn, testified as follows:

*Direct examination by Mr. Walsh:*

Q. You are a member of the Linden Police Department? A. Yes.

20 Q. On the 16th of October last, did you go to St. George's Avenue in the vicinity of Hill's Gas Station? A. Yes, sir.

Q. At what time did you get there? A. About twenty-five minutes of seven.

Q. And what did you find there at that time?

The Court: Twenty-five minutes to seven?

The Witness: To seven.

30 Q. What did you find there, Officer? A. A crowd and a Studebaker sedan, and a motorcycle in front of it.

Q. Where was that with relation to the center of the road? A. The front left wheel of this Studebaker sedan came to about the center of the highway.

Q. And where was the motorcycle? A. The motorcycle was directly in front of it, lying between the splash pan and the pavement.

40 Q. Was there any mark in that road leading from that point to another? A. Yes, there were

*Harry Weitzman, for State—Direct.*

skid marks from a point—the car was about a hundred feet from this point. There were skid marks about fifty-five feet from the park; that is, east of the park, headed to where the car had come to a stop.

Q. I show you exhibit S-8, and ask you if you can locate on that the position of the car or motorcycle when you got there? A. Yes. 10

Q. That, and exhibit S-7—they are both views of the highway—can you just describe it on exhibit S-7? Will you indicate on that where the motorcycle and the car were at the time you got there? A. That is the place (indicating).

The Court: Put a “W” after that, for “Weitzman”.

(Witness does as requested.) 20

Q. Did the marks that you speak about—can you indicate just where they led? A. (Witness indicates.)

Q. How many marks were there? A. There were the skid marks of the tires, and there was a mark right in between the skidmarks that cut right through the soft pavement—the macadam.

Q. Did that lead to the motorcycle? A. Yes.

Q. Did you that night measure that mark that led from the motorcycle—that mark in the soft pavement? A. Yes. 30

Q. How far was it? A. Forty-five feet.

Q. And what kind of a mark in the soft pavement was it? A. A mark where something was dug in and dragged.

Q. I mean how deep was it? A. The eighth of an inch, or so.

By the Court:

Q. That mark which you saw was an indentation in the pavement? A. Yes, your Honor. 40

*Harry Weitzman, for State—Cross.*

By Mr. Walsh:

Q. Forty-four feet, you say? A. About forty-five feet.

Q. I show you exhibit S-6, and ask you if that is a fair representatoin of the Studebaker car you found there that night. A. Yes, it is.

Q. I show you exhibit S-2, and ask you if that is a fair representation of the motorcycle that you found there. A. Yes.

Q. Is that the motorcycle that was caught under the splashpan of the Studebaker car? A. It is.

Q. And the one you have referred to in your testimony? A. Yes.

Q. Was the injured man there at that time? A. No.

Q. Did you see the defendant there? A. No, sir.

Q. You didn't see him there at that time? A. No, sir.

Mr. Walsh: You may examine.

*Cross-examination by Mr. Crane:*

Q. When you spoke of the south side of the street, is the improved part of the street there covered with some sort of patent covering? A. Yes.

Q. And that is what you mean by the south side of the street? A. Yes.

Q. There is not any center, indicated division line? There is not a white mark showing the center? A. Either concrete or—

Q. (Interrupting) Either concrete or paint indicated line? A. No.

Q. Did you measure how many feet from the north side of the street the left front wheel of the Studebaker car was? A. Well, the pavement

*Harry Weitzman, for State—Cross.*

is thirty feet wide, and there is a shoulder on the north side—seven foot.

Q. I don't think you understand my question; from the north side—the improved part of the road, did you measure from the north side to the left front wheel of the Studebaker? A. I didn't measure, but I can tell you about what distance it was. 10

Q. Why didn't you measure it? A. Because it was not necessary.

Q. Why was it necessary to measure these marks back of the car? A. To show how the car skidded, or dragged the motorcycle.

Q. You didn't think it was as important to find out definitely whether the Studebaker car was on its right hand side of the street, did you? A. Well, I thought it was important to mark the— 20

Q. (Interrupting) Pardon me. A. I don't understand the question.

Q. You don't say that the Studebaker was on the wrong side of the street? A. No.

Q. So far as you could observe, it was on the right side of the street? A. In the middle of the highway.

Q. Its left at the center of the road? A. Certainly.

Q. Could you tell from what you saw when you got to the accident whether or not any part of the left side of the Studebaker automobile had been damaged? A. Yes. 30

Q. Had it? A. Sure.

Q. Does it show in the pictures? A. Well, I guess it does.

Q. (Handing witness picture) I show you Exhibit S-5, which is a picture of the automobile. Does that show any damage to the left side of it? A. Yes. 40

*Harry Weitzman, for State—Cross.*

Q. Whereabouts, Officer? A. There, in the chassis; that is, in front of the splash-pan.

Q. Did you observe the dent on the Studebaker car shown in Exhibit S-5 on the top of the hood?

A. Yes.

Q. That was there, was it? A. Yes.

10

Q. By using that picture to aid you, is that on the right or the left hand side of the Studebaker car?

The Court: Does the picture not speak for itself? It is on the right side. I can see that from here. We don't need him for that.

20 Q. And where you marked on exhibit S-7 the place in the road where the car was and where the skidmarks were, you didn't intend that the skidmarks should appear to be on the wrong side of the road at any point, did you? A. The skidmarks?

Q. Yes. A. I think the center of the highway, as I indicated.

By the Court:

30 Q. On the part of the road converging, it would be very difficult to make the mark accurately as it appeared on the road? A. No, you couldn't.

Q. It was not your idea to make the skidmarks on the wrong side of the road, was it? A. No.

*Ethel Shirling, for State—Direct.*

ETHEL SHIRLING, called as a witness by the State, having been first duly sworn testified as follows:

*Direct examination by Mr. Walsh:*

- Q. Where do you live? A. Linden. 10
- Q. What street and what number? A. 1444 St. George Avenue.
- Q. Do you remember the 16th of October last?
- A. Yes.
- Q. At that time, at about 6:20, twenty minutes after six, where were you? A. I was near the garage.
- Q. Whose garage? A. Mine.
- Q. Your garage? A. Yes. 20
- Q. And in what part of the garage were you?
- A. Outside, by the door.
- Q. Outside the building? A. Yes.
- Q. Did anybody come there at that time? A. Yes, a man was coming there.
- Q. What kind of a man? A. A man of one hand.
- Q. Is that man in the courtroom at this time?
- A. Yes.
- Q. Where is he? A. Over there (indicating). 30
- Mr. Walsh: Stand up, Mr. Oliver.  
(A man stands up.)
- Q. Is that the man? A. Yes, sir, that is the man.
- Q. He came to your garage? A. Yes; he came and asked me if we got a telephone, and was—
- Q. (Interrupting) I wish you would talk so that I can hear you. I cannot hear a word you are saying. What were you about to say? A. He was coming there and asked me if I got a telephone, 40

*Ethel Shirling, for State—Cross.*

and I asked him why he wanted to telephone, and he told me, all right, and went away. He was shaking and he looked like he was drunk.

Q. You asked him where he wanted to telephone. Did he make any answer? A. Yes; he told me, all right, and he went away.

10 Q. He told you all right; did he use the 'phone at your place? A. No, sir.

Q. And then he went away? A. Yes.

Q. Do you know where he had come from? A. No.

Q. Do you know where he went to? A. No; he went to the Roselle side.

Q. Where? A. To the Roselle side.

Q. That is on the opposite side of the street?

A. On the same way.

20 The Court: For the benefit of the jury, can we agree that the boundary line of the municipalities of Linden and Roselle run through St. George Avenue at that point?

Mr. Crane: Surely, we can.

The Court: Roselle to the right, and Linden to the left, going toward Rahway.

Q. You didn't see this man again? A. No.

30 Mr. Walsh: You may cross-examine.

*Cross-examination by Mr. Crane:*

Q. Didn't he tell you that he wanted to telephone to New Brunswick? A. No.

Q. What did he say to you? A. He was asking me if I got a telephone, and I told him we had a telephone, and he told me, all right, and then he went away.

*Michael Breen, for State—Direct.*

MICHAEL BREEN, called as a witness by the State, having been first duly sworn, testified as follows:

*Direct examination by Mr. Walsh:*

Q. You are a member of the Linden Police Department? A. Yes. 10

Q. On October 16th last were you near St. George Avenue, near the scene of the accident? A. Yes.

Q. What time did you get there? A. About 6:25, or 6:28.

Q. What did you find there? A. I didn't find any—I seen a crowd of people and there was a Studebaker and a motorcycle lying in the road.

Q. And the motorcycle was caught in the Studebaker, was it? A. Lying in front of the Studebaker. 20

Q. Did you see a mark on the road? A. I saw a lot of broken glass back of the Studebaker.

Q. How far back of the Studebaker was the broken glass? A. Twenty or twenty-five feet.

Q. Did you walk any further back than that? A. No, sir.

Q. Did you see Charles Oliver at the place? A. No, sir; I went around looking for him and I could not find him. 30

Q. Did you see him that night? A. I did, about twenty-five minutes later.

Q. Where did you find him? A. Why, he was coming down the road and two fellows came and said, "There he is, up the road", and I turned the patrol wagon and went up and got him.

Q. And he was coming down the road? A. He was coming down the road.

Q. How far from the scene of the accident—from where you found the Studebaker, was it, that 40

*Michael Breen, for State—Direct.*

you found him? A. Why, above Sterling's Garage—about five hundred feet away.

Q. Did you talk with him? A. I did, yes.

Q. What did you say to him? A. I asked him why did he go away.

Q. And what did he say to you? A. He said,  
10 "I went up the street. I got all nervous after the accident."

Q. Did he know anything about the accident?  
A. He did.

Q. What did he tell you? A. He said he wanted to get his car out to New Brunswick.

Q. Did he say the Studebaker car was his car?  
A. He said it was.

Q. Did he say he had been driving it? A. Yes.

Q. What else did he say? A. I asked him for  
20 his driver's license and receipt, and he didn't want to give them to me. I said, "Let's have them", and so he gave me a little pocket book, and I said, "I am going to take you along with me", and he said, "I have two hundred dollars in that"—and I saw he had only one arm and couldn't get it out of the pocket book, and so I took them out and gave him the pocket book back and I took him to Doctor Barr.

Q. Did you notice anything about his condition  
30 as to sobriety? A. He looked to me under the influence of liquor.

Q. How long have you been with the Police Department? A. Seven years, the 17th of next July.

Q. You took him from St. George Avenue, then, to Doctor Barr; and were you present when Doctor Barr conducted this examination? A. Yes, sir.

Q. And you heard Doctor Barr testify this  
40 morning? A. Yes, sir.

*Michael Breen, for State—Direct.*

Q. In regard to the examination? A. Yes, sir.

Q. And after he was examined by Doctor Barr, where did you take the defendant? A. I brought him to headquarters.

Q. During all that time did he have anything to say to you? A. He said that I was not justice.

Q. That that was not justice? A. That I was not justice. 10

Q. That you were not a justice? A. That I was not treating him justice.

Q. Did he say anything else about his driving the car? A. No; he just wanted to get to Todd, who was a garage man in New Brunswick.

Q. Did you take any measurements at the scene of the accident? A. No, sir.

Mr. Walsh: You may cross-examine. 20

*Cross-examination by Mr. Crane:*

Q. Didn't Oliver tell you that he had been down the road to telephone to New Brunswick to get a garage man to come and get his car? A. No, sir.

Q. Didn't he tell you that he had been to the telephone? A. He said that he had been down the road, but he did not tell me what he had been down there for.

Q. So that we do not get a wrong impression of your testimony—you don't mean that when you saw him he had been going away from the scene of the accident? He was coming towards it, was he not? A. He was on the way back again. 30

Q. You could see that he was horribly nervous when you first talked with him? A. Well, yes, he was kind of nervous.

Q. When you said that he was drinking, and that you were going to take him to the town doctor to examine him, didn't he tell you that he 40

*Michael Breen, for State—Cross.*

wanted a doctor not connected with the town or with the police, to examine him? A. No, sir.

Q. He did not say that? A. No.

Q. He didn't want a doctor to examine him? A. He asked where I was taking him, and I said, to the doctor's.

10 Q. And what did he say to that? A. He said, "I don't see why you are taking me down there."

Q. Didn't he demand that a strange doctor be brought in to make an examination of him? A. Yes; and he wanted us to get him a doctor, and he didn't know any doctor, and let a sergeant call up for him and he called up and finally got this doctor.

Q. Steele? A. Yes.

20 Q. And Steele examined him at Police Headquarters? A. I seen him go in the room. I didn't see him examine him.

Q. What time was that? A. I don't know.

Q. What time was it when you took him to Doctor Barr? A. Around seven o'clock.

Q. And what time did you get him back to the Police Station? A. Between twenty minutes to nine and nine o'clock.

30 Q. Didn't Mr. Oliver tell you that this park policeman was driving his motorcycle East on St. George's Avenue—that is, toward Elizabeth? A. He didn't make any statement as to how anybody was driving. He was worrying about getting his car to New Brunswick.

Q. Didn't he make that statement? He didn't make any such statement? A. No.

Q. Didn't you know that was the fact? A. I didn't bother about that. He didn't say anything about that to me. All he wanted was to get his car to New Brunswick, and I took him to the doctor's, and from the doctor's, to the police station.

40 Q. Did somebody else tell you? A. No.

*Frank Kenny, for State—Direct.*

Q. Did you make any investigation about it to find out?

The Court: Don't let us go into that.

Mr. Crane: There must be some people who saw this officer driving his motorcycle.

The Court: And if no one did, would that lead to the conclusion that he must have been going the other way? 10

Mr. Crane: That is what I wanted to get in the record.

The Court: You will have to get it in the record in some other form of proof. You can argue that from the pictures. I want to hear all the evidence in the case that is really worth while, but I don't want to hear anything else. 20

Mr. Crane: That is all.

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FRANK KENNY, called as a witness by the State, having been first duly sworn, testified as follows:

*Direct examination by Mr. Walsh:*

Q. Were you in Linden on October 16th? A. I was, yes, sir. 30

Q. Did you know Edward Fitzpatrick? A. I did.

Q. How long had you known him? A. Over a year.

Q. How were you traveling in Linden on that day? A. Traveling east.

Q. How were you traveling? In an automobile? A. Yes, sir.

Q. What time did you meet Officer Fitzpatrick that day? A. At five-thirty o'clock. 40

*Frank Kenny, for State—Direct.*

Q. And at what time did you leave him? A. Why, I guess it was about ten minutes past six; or a quarter past six.

Q. You were in your car? A. I was.

Q. Where was he? A. On the motorcycle.

10 Q. At about five or ten minutes after six, you left him where? A. Roselle Street, Linden.

Q. Were you traveling on the highway? A. I was traveling on the highway, east, yes.

Q. What direction was he traveling? A. The same way.

Q. Who was ahead? You, or Fitzpatrick? A. We were quite even at the time.

Q. And after you left Roselle Street? A. He went ahead.

20 The Court: Quite even—what do you mean?

The Witness: I mean we were in a talking position. I was at the driver's wheel, and he was at the motorcycle.

Q. You mean right alongside? A. Yes.

Q. He was riding towards your left coming towards Elizabeth? A. Yes.

Q. And you were coming towards Elizabeth and you were driving on the left? A. Yes.

30 Q. And you were talking one to the other, and he went right ahead? A. Yes.

Q. How far is Roselle Street from the point of the collision? A. I really could not say.

Q. I mean a quarter of a mile or such matter? A. I would imagine about that.

Q. And Fitzpatrick went on ahead? A. Yes.

Q. And then did you see him again? A. No, not until I arrived at the accident.

40 Q. Was there any traffic going east ahead of you? A. Well, there was some at Roselle Street,

*Frank Kenny, for State—Direct.*

and we didn't notice—as a matter of fact, we didn't notice any down around the scene of the accident there.

Q. When you got to the scene of the accident, what did you see? A. I saw the traffic all tied up.

Q. And what else? A. I stopped the car at the scene of the accident. 10

Q. What did you see when you got there? A. I saw the Studebaker car and a motorcycle and recognized it to be a Union County Police officer, and I ran to see if it was Fitzpatrick.

Q. Did you see the man's body? A. It was being lifted into a smaller car by some people who were there.

Q. And what happened then? A. I asked if he wouldn't be put in a bigger car, knowing him—my car about that time was about a hundred feet back of where they had him. 20

Q. When you say that you asked that he be put in a bigger car, what car do you refer to? A. The car I was driving.

Q. Then what did you do? A. I helped—assisted Fitzpatrick into the car.

Q. What car? A. Into the car which I was driving, and he was placed in my arms in the car and Mr. Callen happened to be with me and he drove the car from the scene of the accident to St. Elizabeth's Hospital. 30

Q. And then you helped take him out of the car there? A. I helped to take him out of the car at the hospital, yes, sir.

Q. What was his condition at that time? A. He was complaining terribly about his pain.

Q. Did you talk with him at all? A. Yes; I asked him how it had happened—

Mr. Crane: I object to that.

*Frank Kenny, for State—Cross.*

Q. I don't mean what you said to him, but whether you talked to him.

The Court: The answer was yes, you did talk to him?

The Witness: Yes.

10 The Court: And he talked to you?

The Witness: Yes, he did.

Q. Who was with you? A. Mr. Callen.

Q. Harold J. Callen? A. Yes, sir.

*Cross-examination by Mr. Crane:*

Q. What kind of a car were you driving? A. A Dodge Senior six.

20 Q. How far do you say Roselle Street is from the scene of the accident? You say approximately a quarter of a mile? A. I believe that I can verify that, yes.

Q. How long were you talking with Fitzpatrick? A. No more than you would say "So long, Ed."

Q. Had he been standing there talking with you? A. No, we were riding at about five miles an hour, at a very slow rate of speed.

Q. And as he recognized you, he stopped to talk with you? A. He did.

30 Q. You were going at about what rate of speed? A. Not more than about five or six miles or so.

Q. Just moving along? A. Yes, sir.

Q. And at Roselle Street, he said good-bye, and you said good-bye, and he went ahead of you? A. Yes.

Q. You didn't continue to go five miles an hour? A. No,—I drove the car at a fair rate of speed along the highway.

Q. Twenty miles? Twenty-five miles, or what?

40 A. Twenty-five, to be exact.

*Motion for a Direction of Verdict of Acquittal.*

Q. And the officer went ahead of you? A. He did.

Q. So he was going faster than you were,—going faster than twenty-five miles an hour? A. I can't say that.

Q. Is that right? A. He must have been going a little faster. 10

Q. Did he have a tail-light on the motorcycle? A. I did not notice.

Q. How far could you follow him as he went ahead of you? A. Oh, I guess about a hundred feet or so; passing Roselle Street was the last that I saw him until I reached the accident.

Q. And by the time you got to the accident they had already picked up Fitzpatrick and were taking him and putting him into an automobile. Isn't that right? A. Yes. 20

Q. Then how much time do you think it took you to travel this quarter of a mile from Roselle Street to the scene of the accident going at twenty-five miles an hour, as you say you were? A. Well, five or six minutes, I guess, maybe seven minutes; I didn't just keep track of the time, just how far it was.

Mr. Crane: That is all.

30

(THE STATE RESTS.)

Mr. Crane: If your Honor please, at this time I move for a directed verdict of acquittal, on the ground that, first, the State has absolutely failed to prove, by any sort of evidence whatever, that this defendant did anything that he did not have a lawful

40

*Motion for a Direction of Verdict of Acquittal.*

10 right to do. The uncontradicted proof is that he was proceeding along the road driving an automobile to the right of the center of the road, as it should be driven; that an automobile coming in an opposite direction; or, rather, a motorcycle coming in an opposite direction, which was on the wrong side of the road, crashed into the car at the exact center of his automobile.

20 The fact that the evidence is that the defendant had been drinking—that is, that the testimony of the State's witnesses is that he had been drinking, has no evidential value whatever, because it has no causal connection with this occurrence. In other words, if the defendant had never taken a drink, he would have been in a position of driving along the highway—he could have been in the same position he was at the time of this accident; so, whether he had liquor on his breath, or whether or not he was under the influence of liquor, has no causal connection with the collision.

30 The only proof there is in this case from anyone as to how this man was driving the car, comes from the witness Mr. Vreeland, the young man who was driving a car immediately back of Oliver's car, and from his father-in-law, Mr. Kneirim. Those are the only two witnesses in this case who have said one thing about the manner in which this defendant's car was operated. They are the only witnesses in the case who have said one single thing as to the happening of the accident. Now, then, unless this Court can say that, as a matter of law, from  
40 the testimony of those witnesses, this de-

*Louis Sax, for Defendant—Direct.*

defendant was guilty of some grossly negligent act, it is the duty of the Court, as I see it, to direct a verdict of acquittal.

The Court: In the first place, contributory negligence, if any there was in this case, on the part of the police officer, cannot be heard as being urged as a defense in a criminal case,—if any there was. I don't say there was. In the second place, there is evidence that the driver of this car was under the influence of liquor. If he was, it was a condition in which he voluntarily placed himself, and as the case now stands, it would be for a jury to determine whether a man who voluntarily gets into the condition which the State alleges he was in—namely, under the influence of intoxicating liquor, and then drives a car, is guilty of a wanton and reckless disregard of human life—of the lives of others. The motion, therefore, will be denied.

Mr. Crane: May I have an exception?

The Court: You are allowed an exception.

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LOUIS SAX, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

*Direct examination by Mr. Crane:*

Q. Where do you live, Mr. Sax? 'A. Number 406 Magnolia Avenue, Elizabeth.

Q. On the night of October 16th, in the neighborhood of six o'clock, were you driving an automobile in a westerly direction along St. George's

*Louis Sax, for Defendant—Direct.*

Avenue from Elizabeth towards Linden? A. I was.

Q. About how fast were you driving your car?

A. About twenty miles an hour.

Q. Was there other traffic in the highway? A. A little.

10 Q. Both ways? A. Both ways.

Q. Do you recognize the picture, Exhibit S-8, which is a view of St. George's Avenue, looking towards the west? Do you recognize that picture? A. Yes, sir.

Q. When you got at about the point shown in that picture, Exhibit S-8, what part of the highway were you traveling on? A. I was traveling on the right side, going towards Rahway.

20 Q. And as you got to the part of the road that is shown on that photograph, will you just turn and tell the jury what happened? A. I was traveling in the direction of Rahway at about twenty miles an hour, and all of a sudden I heard a motorcycle; I heard the roar of a motorcycle passing me so close that I pulled my wheel tight and turned to one side for fear he would hit me. He must have been going about—

Mr. Walsh (interrupting): I object to that.

30 The Court: I think it is extending the rule, if this testimony is going in without objection.

Mr. Crane: I just wanted a little information.

40 The Court: Where do you find any rule in the law—any ruling for this testimony in the criminal law? If this man saw the the accident, that is one thing; but where do you find any ruling for the testimony which I assume is directed towards the con-

*Louis Sax, for Defendant—Direct.*

duct of the deceased? That is not what we are trying.

Mr. Crane: Of course I realize that.

The Court: That is the only question here.

Mr. Crane: I realize that; you tried that out in the Elliot case. 10

The Court: And was beaten.

Mr. Crane: No—the Supreme Court said you were wrong.

The Court: I was not trying, in that case, either, to prove contributory negligence.

Mr. Crane: It may not have been there.

The Court: What I was trying to do in the Elliot case was something else, and I learned that the law, which I am about to quote, was that you could not show the conduct of the deceased as bearing on the culpability of the defendant. What is necessary to be done, as I understand the law—although I tried to take the position which you are trying to take in that case, when I defended it—is that you must show that the defendant is not guilty of that which the State alleges; namely, the reckless disregard—a wanton disregard of human life. 20 30

Mr. Crane: That is what I am trying to show.

The Court: You won't be able to show it by trying to show what the deceased did.

Mr. Crane: I think I will.

The Court: I won't let you do it. I state it to be the law, that you cannot do it. If you can show me that I am wrong, then certainly I will let you do it, because I want to be right. 40

*Louis Sax, for Defendant—Direct.*

10 Mr. Crane: I feel certain that the jury are entitled to have before them the situation as it existed at that time—at the time that this collision took place, so that they may judge whether or not the defendant is guilty of any of the acts alleged by the State.

The Court: I am not disputing your right to do that, but what you are now attempting to do is to show how the deceased officer was riding; not at the time of the accident, but at another time.

Mr. Crane: No; that is immediately before the accident.

20 The Court: Exactly so; but it is another time.

Mr. Crane: It is within a second of the time of the accident.

The Court: It has no bearing on this issue, as I see it, and this witness was, at the time I interrupted, attempting to go further than that.

Q. How long have you been driving an automobile? A. Ten years.

30 Q. Are you familiar with the speeds of motor vehicles? Can you tell how fast they are going? A. Yes, sir.

Q. When you reached the scene—I withdraw that; when you reached the place on St. George's Avenue shown in Exhibit S-8, the picture I showed you, what part of the road were you traveling on? A. On the right side, going towards Rahway.

Q. And while you were driving along there, did you hear a noise, and a crash? A. Yes.

40 Q. And when you heard the noise or the crash, what did you do? A. I pulled up slightly.

*Louis Sax, for Defendant—Direct.*

Q. When you heard the crash, what did you do at once? A. I checked up the car and slowed down so that I could go back to see what was the matter and I must have traveled fifty feet before I came to the place where I could park and get out of my car and go back.

Q. When you got there, what did you see? A. 10  
I saw the automobile—the Studebaker automobile and a motorcycle directly in front of it.

Q. Had you seen that motorcycle before you saw it on the ground in front of the Studebaker? A. Yes.

Q. And when was that? A. That was about six minutes before that.

Q. Six minutes? Do you mean minutes? A. Six minutes.

Q. Didn't I understand you to say you were 20  
traveling immediately ahead of the Oliver car?

Mr. Walsh: I object. The witness has not said any such thing.

The Witness: Six minutes after I first saw it, and when I went back.

The Court: That took how long?

A. I slowed down, and went ahead fifty feet, and went back, and walked slowly, and it took about six minutes. 30

Q. You were in the car that was immediately ahead of the Oliver car. Is not that right?

Mr. Walsh: That is objected to as leading. He does not know where the Oliver car was.

The Court: You may ask him where he was; how far from the Oliver car.

*Louis Sax, for Defendant—Direct.*

By the Court:

Q. Do you know whether you were immediately in front of the Oliver car going on that road? A. I must have been.

10 Q. No—no conclusions. Do you know whether you were or not? A. I did not know at that time; but I knew later. I was the only car in front.

Mr. Walsh: He himself didn't know Oliver.

The Witness: I did not know that he was in back of me.

Q. You didn't notice this particularly? A. No.

Q. Of course you didn't? A. I did not know until I went back.

20 Q. You concluded that you were, because there was no other car between you? A. That is the idea.

Q. There was one on the side? A. In the opposite direction.

The Court: In the same direction, too. It is a conclusion which he is arriving at.

By Mr. Crane:

30 Q. Now, you say that you heard this crash? A. Yes, sir.

Q. Had a motorcycle passed you shortly before you heard the crash? A. About two seconds before I heard the crash, the motorcycle passed me.

Q. When you heard the crash, you say that you pulled your car over to the side of the road? A. Yes, sir.

Q. And went back to the scene of the accident—walked back? A. Yes.

40 Q. When you got there, what did you see? A. I

*Louis Sax, for Defendant—Direct.*

saw this Studebaker automobile with the motorcycle directly in front of it.

Q. Was that the motorcycle that had passed you?

Mr. Walsh: I object on the ground that it is leading, and indicates the answer. 10

The Court: I don't think that is leading; if he can tell whether it was or not, he may so answer.

By the Court:

Q. Can you tell whether it was or not? A. I wouldn't swear, but it couldn't have been any other motorcycle.

Q. No—not your conclusion; that is not allowed in law. 20

By Mr. Crane:

Q. Between the time you heard the crash, was there more than one motorcycle that passed you?  
A. Only one.

By the Court:

Q. You say only the one passed you? A. Only one passed me. 30

By Mr. Crane:

Q. As this motorcycle passed you, could you tell who was on it? A. No, sir.

Q. I mean by that, could you tell whether it was an officer, or a man in citizen's clothes? A. I could not.

Q. Why not? A. It was traveling too fast.

Mr. Walsh: He might not have looked. 40

*Louis Sax, for Defendant—Cross.*  
*Harry G. Barton, for Defendant—Direct.*

The Court: You can take him on cross-examination. His answer now is that it was going too fast.

10 Q. How long did you remain there at the place of the accident? A. About ten minutes.

Q. And while you were there, did the motorcycle and the automobile remain in the same position that they were when you first got back there?

A. Yes, sir.

Q. And did you observe on which side of the highway the automobile was? A. Yes, sir.

20 The Court: The State does not deny that it was on the righthand side of the highway. The State's own proof shows that.

Mr. Crane: Take the witness.

*Cross-examination by Mr. Walsh:*

Q. When you got back there, did you see this defendant there? A. Yes, sir.

Q. Did he tell you he was the one who had been driving the car which struck the officer? A. Yes, sir.

Mr. Walsh: That is all.

30

HARRY G. BARTON, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

*Direct examination by Mr. Crane:*

Q. Where do you live? A. 261 Handy Street, New Brunswick, New Jersey.

40 Q. Do you hold any official position in the State of New Jersey? A. Not just now, no, sir.

*Harry G. Barton, for Defendant—Direct.*

Q. You have retired now, have you? A. Yes, sir.

Q. Before you retired, what position did you hold? A. Motor vehicle inspector.

Q. Do you know the defendant, Charlie Oliver?

A. I do.

Q. And do you know what his reputation was in New Brunswick for being a careful automobile driver, before he had this accident? A. I do. 10

The Court: Is that the test, in a criminal case?

Mr. Crane: His general reputation for carefulness.

The Court: Peacefulness and quietness.

Mr. Crane: That is my next question.

The Court: Automobile driving has no bearing. I know of no case which holds you may show what his reputation is; what the general reputation of a person is for driving an automobile. If you know of any, I shall be glad to have it—if you can show me. 20

Mr. Crane: No, sir; but I will say that this question has not been passed on; the Supreme Court is passing on it.

The Court: They are now passing on it? 30

Mr. Crane: They are now passing on it, so I cannot be blamed if I fall into error.

The Court: No.

Mr. Crane: The other fellow did the same thing, and that is the reason why I brought it up.

Mr. Walsh: I move that it be stricken out.

The Court: Motion granted; it will be stricken out, and the jury will pay no attention to it. You may have an exception. 40

*Harry G. Barton, for Defendant—Cross.*

Q. Mr. Barton, how long have you known Mr. Oliver? A. Thirty-eight years.

Q. Do you know where he lives? A. Yes, sir.

Q. Do you know what his general reputation was before this happening, for being a peaceful, orderly and law-abiding citizen in the community in which he lives?

Mr. Walsh: I object to that. I don't think that is the test in this case.

The Court: Well, we are slaves to precedent, and it merely means the precedent, which is to the effect that it is just what his general reputation is for peaceableness and quietness. That is the only question I know of that can be put on this kind of a trial. The objection is sustained.

Mr. Crane: Exception.

Q. Mr. Barton, from your acquaintance with Mr. Oliver over a number of years, do you know what his general reputation is in the community in which he lives—or, rather, was, in the community in which he lives, for peaceableness and quietness? Yes, or no? A. Yes.

Q. What was that reputation? A. Good.

30 *Cross-examination by Mr. Walsh:*

Q. Do you live in the community in which he lives? A. In New Brunswick.

Q. In the same city? A. Yes, sir—just on the outskirts is his,—his residence.

Q. And you have known him for thirty-eight years? A. Yes, sir.

Q. Are you any relative of his? A. No, sir; none whatever.

40 Q. You say his reputation in that community

*Harry G. Barton, for Defendant—Cross.*

for peaceableness and quietness is good? A. Yes, sir.

Q. Did you ever hear it discussed? A. Just how do you mean?

Q. Did you ever hear anybody discussing that?  
A. No, sir.

Q. As a matter of fact, you don't know what his reputation is, if you didn't hear it? A. I have lived with him around New Brunswick for thirty-eight years, and I never heard of any trouble with him, with anybody.

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Q. Do you know what the word "reputation" means? A. You define it for me, and I will answer your question.

The Court: No; if you know what it means, say so.

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The Witness: I know it means that he has a good reputation. He is a good, law-abiding citizen.

By the Court:

Q. What others say about him? A. Yes.

By Mr. Walsh:

Q. No—what did you ever hear any others say about him? A. Good.

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Q. When was the thing discussed? A. At fire house meetings.

Q. He belonged to same fire company that you did? A. Yes.

Q. And his reputation for peacefulness and quietness were discussed at fire house meetings? A. You know, in a general—

Q. (Interrupting) His reputation for peaceableness and quietness was discussed at fire meetings? Yes, or no? A. No.

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*Harry G. Barton, for Defendant—Cross.*

Q. Well, then, you did not hear it discussed at fire house meetings? A. In an offhand way, yes.

Q. You didn't hear him discussed at fire house meetings? A. Not publicly, no; they would say he was just a good fellow, and the like of that.

10 Mr. Walsh: I ask that that be stricken out.

Q. Did you ever hear his reputation for peacefulness and quietude discussed? A. Yes.

Q. When? A. On the street, after the accident happened.

Q. Before the accident happened. A. Oh, before?

Q. I meant to say that. I say it now. A. No.

20 Q. So when counsel for the defense asked what you knew about his reputation for peacefulness and quietude was—what his reputation was, you did not know? A. In my opinion, yes.

Q. I am not asking for your opinion. You don't know what his reputation was? A. I never heard anything against him.

Q. Did you know what his reputation was? Yes, or no? A. That means what you say and others say of him?

Q. Yes. A. No.

30 Q. So the answer given to the defendant's counsel was not— A. (interrupting): I might have made a mistake.

Q. (Continued): Was not in accordance with the facts, was it? A. No—not the way you put it.

Q. And the answer you made to that was simply your opinion of him? A. Yes; I am the witness here.

Q. It was your opinion? A. Yes.

40 Q. Not his reputation? A. I never heard anything against him.

*Harry G. Barton, for Defendant—Cross.*

Mr. Walsh: I ask that that be stricken out.

Q. You never knew anything about his reputation prior to this accident? A. I never heard anything against him.

Q. His reputation means what others say about him. A. I never heard him discussed, the way you put it.

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By Mr. Crane:

Q. You lived in the same town with him for thirty-eight years? A. Yes.

(DEFENDANT RESTS.)

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Mr. Crane: I move for a directed verdict of acquittal, because the State has failed to prove that the defendant was guilty of any act that could be construed to be gross negligence, and because the State has failed to prove that the defendant operated his car any differently than he had a lawful right to do, and because there is no evidence in the case, under the State's testimony, that the fact that the defendant had been drinking caused the happening of the accident.

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The Court: The motion will be denied and an exception will be allowed.

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### Charge of the Court.

The Court: Gentlemen of the Jury: The law throws about persons accused of crime certain safeguards which the Court is bound, in the full discharge of its duty, to disclose to the jury. Nowhere, however, is it written in the law that sympathy or prejudice are part and parcel of the things which juries are to consider in determining what their verdict should be. On the contrary, it is the law that sympathy and prejudice have no place in the jury box, and therefore you will not be swayed either by sympathy for the defendant or for the deceased, or by any prejudice toward the deceased because of any evidence that may have been adduced in the trial of this case. The law you must take from the Court, and I know you will take it. With the evidence the Court has no right to deal; that is entirely for you; you are the sole judges of what is the proof from this evidence which has been here presented.

Now, the law presumes the defendant to be innocent, and that presumption continues until overcome by proof on the part of the State to the satisfaction of the jury beyond a reasonable doubt, of his guilt.

The burden is on the State of New Jersey to satisfy you beyond a reasonable doubt that the defendant is guilty of the crime that is charged against him.

Reasonable doubt has a meaning in law; and by reasonable doubt is not meant any possible or imaginary doubt, because everything relating to human affairs is open to some possible or some imaginary doubt. The definition of what is meant by reasonable doubt in law is that state of the case which after the entire comparison and consideration of all of the evidence leaves the minds

*Charge of the Court.*

of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. Therefore, if, upon the proof in the case, there be reasonable doubt as I have defined it to you, remaining in the minds of the jurors, the accused is entitled to the benefit of that doubt by an acquittal.

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Manslaughter in law is of two kinds—voluntary or involuntary, and you are not concerned in this case with what is voluntary manslaughter, for, if the defendant is guilty of manslaughter at all, he is guilty of what is known as involuntary manslaughter.

Involuntary manslaughter is the unlawful killing of a human being without malice, either expressed or implied, and without intent to kill or event inflict the injury which causes death, and may be committed in the improper or negligent performance of an act lawful in itself.

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What the State contends in prosecuting this indictment is, that this defendant, without any malice against the deceased, and without any intent to kill the deceased, was improperly and negligently performing what was a lawful act—namely, the driving of this automobile, and that the deceased came to his death because of such improper and negligent performance of a lawful act.

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The mere fact that this accident happened, and that the deceased died as the result thereof, raises no presumption as to the guilt of the defendant, and unless it is proved to your satisfaction beyond a reasonable doubt, as I have defined it, that the defendant on the occasion of this happening, evinced a reckless disregard for human life by his conduct at that time and place, as the result of which reckless and criminal disregard for human

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*Charge of the Court.*

life the deceased came to his death, then the State has failed to prove its case against the defendant and you would be obliged to acquit.

10 Criminal negligence is a fact that must be proven. It will not be presumed; and if the State fails to prove its case beyond a reasonable doubt, the defendant is entitled to an acquittal. It is needless to say that every slight breach of duty from which death results will not make out the crime of manslaughter.

20 Now, the State in this case alleges—and has offered some proof through witnesses—that this defendant drove his automobile, on the day in question, while under the influence of liquor. Intoxication, or being rendered under the influence of liquor, is a voluntary thing. A man may drink or not, as he pleases. In law, he is responsible for his voluntary condition of intoxication, or of rendering himself in such a condition that he is under the influence of liquor, and the State contends, as I understand it, that this defendant on this day was in the condition where he was under the influence of liquor.

30 Now, he knew, or should have known his condition, and while in that condition, the State alleges, he drove this car, and the State claims that it was this condition which brought about the accident which resulted in the death of this police officer.

40 Now, I want to say to you at this point, Gentlemen, that whether the deceased was a judge of a court, or a police officer, or held any position of distinction, makes no difference in this case. After all, the deceased only possessed a human life, and you must not place importance to the extent of having your verdict swayed by the fact that the deceased was a police officer. There is no such

*Charge of the Court.*

distinction as that recognized in law. Manslaughter is manslaughter, whether it be the Chief Justice of the United States, or whether it be the humblest citizen in the land.

So far as I can understand this evidence, you have no explanation as to how the officer was driving his motorcycle, and I will point out to you that, no matter how the officer was driving the motorcycle, contributory negligence is no answer that the defendant can urge in a criminal case of this kind. What you are trying, and trying solely, is the acts and conduct of the defendant on the day in question, and, from it,—this conduct—you must say, if you can say, whether or not he was at that time and place and under the circumstances existing on that highway, by his conduct evincing a reckless disregard for human life. If you are satisfied of that beyond a reasonable doubt, then the defendant would be guilty. If he was not, then the State has failed to make out its case.

Now, with reference to the evidence of the condition of the defendant as to intoxication, or being under the influence of liquor, before that fact, if you find it to be a fact, that he was in that condition, can lead to a conviction in this case, that condition must have been a competent and contributing factor, taken together with all of the other facts in the case going to prove that the defendant was guilty of gross negligence; of criminal negligence, before you can convict. In other words, if it be true that the evidence discloses that the defendant was under the influence of liquor, and the condition into which he had voluntarily rendered himself, had no causal relationship to the accident which resulted in the police officer's death, then you should acquit.

*Charge of the Court.*

The defendant sat here in this court room during this trial and heard the evidence adduced against him, and you have a right to consider the fact that after at the close of the State's case he did not take the stand in his own defense; not as proving that he is therefore guilty—not at all; 10 but you have a right to consider it from the standpoint of whether or not, acting as he did in not taking the stand, he was in a position to deny the things which were alleged against him.

Now, Gentlemen, this is a very serious matter, and I want to caution you because of some things that were said in the summation, against allowing your experience to enter into consideration of this case, or any knowledge which you may have acquired on the outside with reference to the accident that happened, from which death resulted. 20 You can only predicate your verdict in this case, under your sworn oath, on the evidence adduced here at this trial, and nothing else, and while it may be more or less difficult for you to exclude from your minds—and therefore from the consideration of this case—things which you may know from common experience, it is your duty to do so. All you may do in this case is to consider the evidence produced here and say from it whether 30 or not the accused is guilty, or whether he is innocent.

Against, it is only proper that I say to you that the fact that you note that the defendant has a physical impairment, in that he has but one arm, should not sway you in deciding this case. He was, on the day in question, a licensed driver—licensed by the State authorities. He had, therefore, as far as the one arm is concerned, a right to drive, and it is not one of the things which the 40 State urges as a reason for his conviction, or as

*Charge of the Court.*

evidence of a criminal disregard in operating that car, for the lives of others.

Now, here, (speaking of the circumstances surrounding the happening of the accident), is an avenue of considerable width. The width of the avenue was agreed upon by counsel for the State and for the defense, to be in its paved portion, thirty feet, with unpaved shoulders, on either side, of seven feet. Therefore, it is an avenue of forty-four feet in width. You have heard the evidence of the State's witnesses as to the exact point in the avenue, as nearly as they can get it, where this accident happened. That you must consider, together with all the other evidence, in determining whether or not the defendant evinced a reckless disregard for human life.

The testimony of at least two witnesses, as my recollection serves me, was to the effect that they were riding in a car to the rear of the car of this defendant—a young man and his father-in-law, whose names I do not recall just now; that they were driving the car to the right of the road—that is, the paved portions thereof; that the defendant was driving his car ahead of them to the left of their car, near the center, and that suddenly there was a crash, and that the witnesses saw an object fly into the air, land on the car hood, and then drop off to the pavement, and that the body lay with outstretched arms near the outer edge of the pavement, on the righthand side in the direction in which they were driving, and it was the body of this police officer, who is now dead. There is also evidence that the car driven by the defendant went a considerable distance, which was mentioned, one witness saying forty-five and another fifty feet, after it came in contact with the officer. Now, at what speed was he

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*Charge of the Court.*

driving? Has that evidence any significance in your minds, as to the speed? Some of the State's witnesses say they were driving at twenty-five miles an hour. I don't recall now whether anybody placed the speed at which the defendant was driving. I want you to remember that my recollection of the evidence does not govern you, and I give you the best recollection I have, but you must decide this case on your own recollection. In addition to the evidence of the body flying in the air, and of the car going a distance—a considerable distance—I should put it, after the impact, you have these photographs here in evidence which show that the bumper of the defendant's car was shoved in until it appeared like the letter "V". The front wheel of the motorcycle is completely or nearly completely demolished.

Now, how did this happen? Does that indicate to you a terrific impact? Does that indicate to you, that evidence, and the condition of that motorcycle, the speed? And, if so, what speed? And that is one of the important things, I think, together with all of the other evidence, that will aid you in determining this case; but what I think does not govern you—must not and should not. It is the court's right to comment on these things, and, as the higher courts have frequently said, it is their duty to do it if in any way they can by so doing aid the jury.

The gist of the complaint against the defendant is, that he was, at the time and place in question, evincing a reckless disregard for human life. Now, if he was not, the State has not made out its case. If he was, and you are satisfied that he was, beyond a reasonable doubt, evincing a reckless disregard—a wanton disregard of human life—a

*Charge of the Court.*

criminal carelessness—then he must answer to the charge of manslaughter and he should be convicted. If he was not, then he should be acquitted.

Now, it makes no difference whether the man who died was a police officer or not. If this man is not guilty according to the law from the evidence as it appears before you, of manslaughter, he should not be convicted. No guilty man should escape, but no innocent man should be convicted. So you will see, gentlemen, when we compliment men like you for coming in and helping us in the administration of justice, we have good reason for it, because your position is a highly important one, both to the individual and to the State. 10

Let me say in conclusion, as has already been intimated by counsel to you, both for the defense and for the State, that the lateness of the hour should play no part, of course, in the proper disposition of the case, and I know that it will not with you gentlemen, and that you will consider this matter and give it all the time and all the attention that it so richly deserves. 20

Now, you may retire.

(Counsel for the defendant hands to the Court requests to charge.)

The Court: I refuse to charge other than I have charged. You had better give that to the stenographer, who will make some notes, and give it back to you. 30

(The requests to charge were as follows):

“The legal presumption of innocence which follows and stays with the defendant throughout the trial, protects a defendant in a criminal case from any presumption of a grossly negligent act on his part, without proof thereof beyond a reasonable doubt, so that if this presumption of innocence has not been overcome, you must acquit him. 40

*Charge of the Court.*

The failure to exercise such care, prudence and forethought as duty requires to be given or exercised under the circumstances, is negligence. But I charge you that every slight breach of duty from which death resulted will not make out the crime of manslaughter. It is necessary for the State to prove beyond a reasonable doubt that the defendant was so grossly negligent as to show a recklessness and indifference whether wrong was done or not—an indifference to the rights of others—and if the State has failed to prove such a degree of carelessness and negligence on the part of this defendant, you must acquit him.

Unless you can find from the evidence beyond a reasonable doubt that the defendant, in utter disregard of the rights of other users of the highway, and this deceased, was so grossly negligent in the operation of his automobile that as a result of that gross disregard of the rights of the deceased, his death resulted, then you must acquit and exonerate this defendant.

If you find from the evidence that the deceased came to his death as the result of driving his motorcycle at a high and excessive rate of speed directly at and into the automobile of the defendant, the law would not permit you to convict the defendant in this case, and you must acquit him.

An officer of the law has no more right to violate the law than anyone else, and the mere fact that the deceased was a policeman would not excuse his driving his motorcycle on the wrong side of the road, at a high and excessive rate of speed, so as to lose control thereof and drive directly into the front of defendant's automobile. Therefore, if you find that the deceased met his death as the sole and exclusive result of his violation of the Motor Vehicle Law, or the Traffic Act, you must acquit the defendant.

*Charge of the Court.*

There has been some evidence in this case that the defendant had been drinking and was under the influence of liquor, although this is denied by the defendant and his witnesses, but before that fact—if you find it to be a fact—can lead to a conviction in this case, it must have been a potent and contributing factor, taken together with all of the other evidence in the case, going to prove that the defendant was guilty of a grossly negligent act, before you can convict him. In other words, even though the defendant had been drinking, if it had no effect on his driving of his automobile, and had no logical or causal connection with the accident, then the question of whether the defendant had been drinking has no place in this case.

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You are not dealing here with violations of the Motor Vehicle Law or the Traffic Act. Those laws, or any of their provisions, could have been violated by the defendant and still he could not be convicted of manslaughter, unless in connection with their violation, he was guilty of some grossly negligent act, as I have defined it to you.

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The violation of the provisions of the Motor Vehicle Law or the Traffic Act is not, in and of itself, even evidence of negligence, let alone gross negligence, but if the jury find that the provisions of the Motor Vehicle Law or the Traffic Act have been violated, the evidence of such violation may be considered by the jury in connection with all of the other evidence in the case in determining whether or not the defendant was guilty of some grossly negligent act that brought about the death of the deceased.

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In all criminal trials it is the right of the accused to have all of the relevant testimony, which in this case includes that relating to his good reputation as a careful, prudent automobile driver,

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*Charge of the Court.*

considered by the jury, and if, on such consideration, there exists a reasonable doubt of his guilt, even though such doubt is engendered merely by his good reputation, he is entitled to an acquittal.

10 In all criminal trials it is the right of the accused to have all of the relevant testimony, including that relating to his good reputation, considered by the jury, and if, on such consideration, there exists a reasonable doubt of his guilt, even though such doubt is engendered merely by his good reputation, he is entitled to an acquittal."

Mr. Crane: I want an exception to your refusal to charge as requested. I also want an exception to that part of your Honor's charge about the speed of the car.

20 The Court: Whatever I said about the speed?  
Mr. Crane: Yes, about the speed; and I want a general exception.

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**Judge's Certificate.**

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY,  
Defendant-in-Error,

*vs.*

CHARLES OLIVER,  
Plaintiff-in-Error.

In Error.

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I, Alfred A. Stein, Judge of the Union County Court of Quarter Sessions, who held the Court of Quarter Sessions at which the above stated cause was tried, do hereby certify that the foregoing is the entire record of the proceedings had upon the trial of said cause.

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ALFRED A. STEIN,  
Judge of the Union County Court  
of Quarter Sessions.

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**Assignment of Errors.**

(Filed April 11, 1929.)

NEW JERSEY SUPREME COURT.

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STATE OF NEW JERSEY,  
Defendant-in-Error,*vs.*CHARLES OLIVER,  
Plaintiff-in-Error.

In Error.

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Afterwards, to wit, on the 15th day of February, 1929, before our said Supreme Court of New Jersey, comes Charles Oliver, by Robert Newton Crane, his attorney, and says that in the record and proceedings aforesaid and also in the matters recited and contained in said bill of exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

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1. That the Court below erred to the prejudice and injury of the plaintiff-in-error, in permitting the Prosecutor to ask Stephen Steele, a witness produced by the defendant, the question: "How long before your examination would you say that he had been in an intoxicated condition."

2. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to direct a verdict of acquittal at the close of the State's case.

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3. That the Court below erred to the prejudice and injury of the plaintiff-in-error, in striking from the record the testimony of

*Assignment of Errors.*

Harry G. Barton concerning the general reputation of the defendant as a careful automobile driver.

4. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to direct a verdict of acquittal at the close of the entire case.

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5. That the Court below erred to the prejudice and injury of the plaintiff-in-error, in charging the jury as follows: "There is also evidence that the car driven by the defendant went a considerable distance, which was mentioned, one witness saying forty-five and another fifty feet, after it came in contact with the officer. Now at what speed was he driving? Has that evidence any significance in your minds, as to the speed?"

6. That the Court below erred to the prejudice and injury of the plaintiff-in-error, in charging the jury as follows: "Now, how did this happen? Does that indicate to you a terrific impact? Does that indicate to you, that evidence, and the condition of that motorcycle, the speed? And, if so, what speed? And that is one of the important things, I think, together with all of the other evidence, that will aid you in determining this case."

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7. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to charge the jury as requested by the defendant, as follows: "If you find from the evidence that the deceased came to his death as the result of driving his motorcycle at a high and excessive rate of speed directly at and into the automobile of the defendant, the law would not permit you to convict the defendant in this case, and you must acquit him."

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8. That the Court below erred to the prejudice and injury of the plaintiff-in-error,

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*Assignment of Errors.*

10 by refusing to charge the jury as requested by the defendant, as follows: "An officer of the law has no more right to violate the law than anyone else, and the mere fact that the deceased was a policeman would not excuse his driving his motorcycle on the wrong side of the road, at a high and excessive rate of speed, so as to lose control thereof and drive directly into the front of the defendant's automobile. Therefore, if you find that the deceased met his death as the sole and exclusive result of his violation of the Motor Vehicle Law, or the Traffic Act, you must acquit the defendant."

20 9. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to charge the jury as requested by the defendant, as follows: "You are not dealing with violations of the Motor Vehicle Law or the Traffic Act. Those laws, or any of their provisions, could have been violated by the defendant and still he could not be convicted of manslaughter, unless in connection with their violation, he was guilty of some grossly negligent act, as I have defined it to you."

30 10. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to charge the jury as requested by the defendant, as follows: "In all criminal trials it is the right of the accused to have all of the relevant testimony, which in this case includes that relating to his good reputation as a careful, prudent automobile driver, considered by the jury, and if, on such consideration, there exists a reasonable doubt of his guilt, even though such doubt is engendered merely by his good reputation, he is entitled to an acquittal."

40 11. That the verdict was against the weight of evidence.

*Reasons for Reversal.*

And the said plaintiff-in-error prays that the judgment aforesaid, for the errors aforesaid, and for the errors therein, be reversed, annulled and altogether holden for nothing, and that he may be restored in all things in which he has lost by reason of said judgment.

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ROBERT NEWTON CRANE,  
Attorney for and of Counsel with  
Plaintiff-in-Error.

**Reasons for Reversal.**

(Filed April 11, 1929.)

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NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY,  
Defendant-in-Error,

*vs.*

CHARLES OLIVER,  
Plaintiff-in-Error.

In Error.

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And now comes the said Charles Oliver, by Robert Newton Crane, his attorney, and says that in the record and proceedings aforesaid, and also in the giving of judgment aforesaid, there is manifest error, and said Charles Oliver says that the judgment should be reversed, and assigns the following reasons:

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*Reasons for Reversal.*

10 1. That the Court below erred to the prejudice and injury of the plaintiff-in-error, in permitting the Prosecutor to ask Stephen Steele, a witness produced by the defendant, the question: "How long before your examination would you say that he had been in an intoxicated condition?"

2. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to direct a verdict of acquittal at the close of the State's case.

3. That the Court below erred to the prejudice and injury of the plaintiff-in-error, in striking from the record of the testimony of Harry G. Barton concerning the general reputation of the defendant as a careful automobile driver.

20 4. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to direct a verdict of acquittal at the close of the entire case.

30 5. That the Court below erred to the prejudice and injury of the plaintiff-in-error, in charging the jury as follows: "There is also evidence that the car driven by the defendant went a considerable distance, which was mentioned, one witness saying forty-five and another fifty feet, after it came in contact with the officer. Now, at what speed was he driving? Has that evidence any significance in your minds, as to the speed?"

40 6. That the Court below erred to the prejudice and injury of the plaintiff-in-error, in charging the jury as follows: "Now, how did this happen? Does that indicate to you, that evidence, and the condition of that motorcycle, the speed? And, if so, what speed? And that is one of the important things, I think, together with all of the other evidence, that will aid you in determining this case."

*Reasons for Reversal.*

7. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to charge the jury as requested by the defendant, as follows: "If you find from the evidence that the deceased came to his death as the result of driving his motorcycle at a high and excessive rate of speed, directly at and into the automobile of the defendant, the law would not permit you to convict the defendant in this case, and you must acquit him." 10

8. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to charge the jury as requested by the defendant, as follows: "An officer of the law has no more right to violate the law than any one else, and the mere fact that the deceased was a policeman would not excuse his driving his motorcycle on the wrong side of the road, at a high and excessive rate of speed, so as to lose control thereof and drive directly into the front of the defendant's automobile. Therefore, if you find that the deceased met his death as the sole and exclusive result of his violation of the Motor Vehicle Law, or the Traffic Act, you must acquit the defendant." 20

9. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by refusing to charge the jury as requested by the defendant, as follows: "You are not dealing with violations of the Motor Vehicle Law or the Traffic Act. Those laws, or any of their provisions, could have been violated by the defendant and still he could not be convicted of manslaughter, unless in connection with their violation, he was guilty of some grossly negligent act, as I have defined it to you." 30

10. That the Court below erred to the prejudice and injury of the plaintiff-in-error, by 40

*Reasons for Reversal.*

10 refusing to charge the jury as requested by the defendant, as follows: "In all criminal trials it is the right of the accused to have all of the relevant testimony, which in this case includes that relating to his good reputation as a careful, prudent automobile driver, considered by the jury, and if, on such consideration, there exists a reasonable doubt of his guilt, even though such doubt is engendered merely by his good reputation, he is entitled to an acquittal."

11. That the verdict was against the weight of evidence.

ROBERT NEWTON CRANE,  
Attorney for and of Counsel  
with Plaintiff-in-Error.

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**Joinder in Error.**

(Filed April 11, 1929.)

## NEW JERSEY SUPREME COURT.

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STATE OF NEW JERSEY,  
Defendant-in-Error,

*vs.*

CHARLES OLIVER,  
Plaintiff-in-Error.

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In Error.

And thereupon, afterwards, to wit, on the 10th day of April, A. D. Nineteen Hundred and Twenty-nine, the said State of New Jersey, by Abe J. David, Prosecutor of the Pleas of the County of Union, comes into Court and says that there is no error in the record and proceedings aforesaid, and he prays that the Court here may proceed to examine as well the record and proceedings as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, etc.

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ABE J. DAVID,  
Prosecutor of the Pleas.

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## New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>  <i>vs.</i>  CHARLES OLIVER, <i>Plaintiff-in-Error.</i>	}	<i>On Writ of Error.</i>
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### BRIEF FOR DEFENDANT-IN-ERROR.

This brief which was submitted in the Supreme Court, is re-printed and submitted in the Court of Errors and Appeals under this pending writ of error.

Upon reading both the State of the Case and the brief of the plaintiff-in-error in the above-stated case, it is clear that there is no substantial question of law raised by the plaintiff-in-error either in the State of the Case, or in his brief.

It is evident from the brief of the plaintiff-in-error that this was a case which was heard and decided by the jury on the facts alone, and the plaintiff-in-error did not take the witness-stand and make any defense to the charge. In the case at bar there was ample proof before the jury that the plaintiff-in-error was guilty of manslaughter, and that he did evince a reckless disregard of human life in the operation of the automobile which caused the death of a park policeman who was riding a motorcycle at the time.

The testimony of the witnesses in evidence of the reckless driving of the automobile by the plaintiff-in-error follows:

(P. 16, l. 33) Dr. Barr, Police Surgeon of the City of Linden made an examination of Charles Oliver, the plaintiff-in-error, on October 16, 1928, about 7 P. M., and shortly after the time of the collision.

(P. 17, l. 18). I found that plaintiff-in-error was under the influence of liquor, after my examination of him. (p. 17, l. 26) Plaintiff-in-error waggled from side to side. (p. 17, l. 28) Plaintiff-in-error straggled from side to side. He did not walk straight. (p. 17, l. 31). He couldn't walk straight; (p. 17, l. 39) he was unable to stand still. (p. 18, l. 23) Plaintiff-in-error had a very strong odor of liquor. (p. 22, l. 1). Q The other symptoms? A I say, that these symptoms would not have appeared at the time. Q Unless he had been under the influence of liquor? A Absolutely.

Dr. Stephen Steele, produced by the plaintiff-in-error at this time in his behalf, examined the plaintiff-in-error at 8:30 P. M., on October 16, 1928, the same day. (p. 30, l. 12) Q to Dr. Steele— You found plaintiff-in-error had been drinking? A Yes—that he admitted himself, that he was drinking. (p. 30, l. 21) Q Plaintiff-in-error admitted that he had been drinking intoxicating liquor? A Yes. (p. 31, l. 34) Q When you examined him, you could tell that he had been under the influence of liquor, could you not? A Yes.

Elmer R. Vreeland, witness for the State testified as follows:—(p. 36, l. 35) On the 16th of October last, at about 6:15 P. M. (l. 40) I was driving a car. (p. 37, l. 12) Q What first attracted your attention? A The loud sound of a crash. Right in front of me. (p. 37, l. 16) It was to the front and to the left of me. (p. 37,

l. 35) And a little to the left of you and to the front of you was Charles Oliver's car? A That is right. (p. 38, l. 26). Q As you brought your car to a stop where was the Studebaker sedan (car of plaintiff-in-error)? A On my left. (l. 28) Approximately in the middle of the street. (l. 30) Who was in the Studebaker sedan when you got to it? Nobody. (p. 39, l. 26). After getting in the car, what did plaintiff-in-error do? A He was going to drive it away, and somebody told him he had better not (p. 41, l. 20). How far back from the point of crash was it that plaintiff-in-error passed you at that time? A About 200 feet (p. 41, l. 34). He was just about on the center of the road; that is the left side wheel was out about the center of the road.

Harry Knierim, a passenger with Elmer R. Vreeland, witness for the State, confirms the testimony of Mr. Vreeland (p. 52, l. 23). Where was the Studebaker car? A In the roadway. Q What part of the roadway? A Out in the center (p. 53, l. 4). It was pretty near to the center. It was near to the left that we were, and we were just about on the right-hand side. (p. 53, l. 18). Q You don't mean that the plaintiff-in-error went away? A The party that got in the car and tried to drive it away before got out of the car and left before I got up there.

Harry Weitzman, a police officer, testified as follows (p. 55, l. 30): Did you that night measure that mark that led from the motorcycle—that mark in the soft pavement? A Yes. Q How far was it? A 45 feet. Q And what kind of a mark on the soft pavement was it? A A mark where something was dug in and dragged.

Michael Breen, a police officer, testified as follows (p. 62, l. 4): I asked plaintiff-in-error why did he go away? He say "I went up the street. I got all nervous after the accident (p. 62, l 30). Plaintiff-in-error looked to me under the influence of liquor.

#### POINT 1.

St. Georges avenue, Linden, is the Lincoln Highway from Elizabeth through Linden to Rahway and on to Trenton. It is the main artery for automobiles, and the traffic is heavy at all times. The plaintiff-in-error who has but one arm, was driving his automobile along the highway at a speed of 25 miles an hour or more. He passed the automobile of Elmer R. Vreeland, who was driving about 25 miles an hour and was about 200 feet ahead of him at the time of the collision. In order to pass this car, plaintiff-in-error had pulled out to the middle of the highway and must have increased his speed to pass by. Plaintiff-in-error had not driven back to the right of the highway after passing by and the collision took place in the middle of the highway.

Here we have the plaintiff-in-error, who only has one arm, speeding by another automobile, driving at the time along the middle of the highway, and admittedly intoxicated. The plaintiff-in-error did not testify, and it may be assumed that the deceased was on the proper side of the highway. It is a presumption of fact that the plaintiff-in-error, being intoxicated, did not know where he was driving and could not properly control his automobile. When the plaintiff-in-error drove out to the middle of the highway he cut off the deceased, and made no effort what-

ever to drive back to plaintiff-in-error's side of the highway, nor did he attempt to stop his automobile for his automobile dragged the motorcycle of the deceased 45 feet along the pavement.

We respectfully submit that the plaintiff-in-error was operating his automobile, at a reckless speed and in a reckless manner, because when a man is intoxicated and driving an automobile, he is not alert to the rights of others and surely lacks the intelligence required to observe the rules of the road and the proper control of his car, and that the operation of the car by the plaintiff-in-error in the manner stated was a wanton act.

When plaintiff-in-error was driving his automobile, passing another automobile, remaining out in the middle of the highway, and intoxicated, it can be said safely that plaintiff-in-error did not know where he was and what he was doing. He left the scene of the collision and made no effort to aid the deceased.

As the Court said in *State v. Fairbrothers*, 124 Atl. Rep. page 452, (99 N. J. L. page 295), Court of Errors and Appeals at page 453. There was also testimony which indicated that the automobile was being propelled in such a careless and reckless disregard of human life and of the rights of others in the use of the public highway.

The testimony in the case at bar brings the case squarely within this principle of law and we respectfully submit the conviction should be sustained.

**POINT 2.**

Regarding the alleged errors of the Court as argued in plaintiff-in-error's brief, we respectfully submit the law is as follows:

The rule is that a trial judge in his charge may call attention to any matter affecting the credibility of the witnesses and may comment upon the testimony and intimate an opinion as to its weight, whenever he thinks it necessary for the promotion of justice, as long as he fairly leaves the jury to determine the facts and draw their own conclusions as to the credibility of the witnesses and the weight of this testimony.

*State v. Grace*, 98 N. J. L. page 341; 119 Atl. R. page 767.

Criticism of the charge. This falls within the rule stated in *State v. Contarino*, 92 N. J. L. page 381, 385. In that case, it is said, to be settled, that if instructions contain several propositions, some of which are proper, an objection to the whole will not avail. The particular points deemed erroneous must be pointed out. A reversal will not be had, when the exception is not directed specifically to the proposition to be erroneous.

It is respectfully submitted that no error was committed either in the charge of the Court or in the entire proceedings had upon the trial by which the plaintiff-in-error suffered manifest wrong or injury. In the case at bar there was ample proof before the jury. The plaintiff-in-error made no proof whatever, and the weight of the evidence was clearly with the State.

We respectfully submit that the conviction should be sustained.

ABE J. DAVID,  
Prosecutor of the Pleas,  
Attorney for the Defendant-in-Error  
and of Counsel.

WALTER C. TENNEY,  
Assistant Prosecutor,  
Of Counsel.

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## New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,  
Defendant-in-Error,

*vs.*

CHARLES OLIVER,  
Plaintiff-in-Error.

On Writ of Error  
to Supreme Court.

### BRIEF FOR PLAINTIFF-IN-ERROR.

Defendant, Charles Oliver, was indicted by the Union County Grand Jury at the October Term, 1928, for manslaughter by automobile. Defendant was driving a Studebaker sedan and deceased was riding a motorcycle.

Case, Indictment, pp. 3-5.

Defendant pleaded not guilty on November 9, 1928.

Case, Plea, p. 6, lines 14-25.

He was tried December 7, 1928, and the jury brought in a verdict of guilty.

Case, Trial and Verdict, p. 6, lines 26-40;  
p. 7, lines 1-26.

The Court, on December 12, 1928, imposed a sentence of one year in State Prison.

Case, Judgment, p. 7, lines 27-40; p. 8,  
lines 1-10.

A writ of error was sued out on December 20, 1928.

Case, Writ of Error, pp. 1 and 2.

Judge Stein, of the Union County Court of Quarter Sessions, who presided at the trial, granted a certificate of reasonable doubt and defendant was admitted to bail in the sum of \$1,500.00 pending the prosecution of the writ of error.

Case, Certificate of Reasonable Doubt, pp. 8 and 9.

The case was argued at the May Term, 1929, of the Supreme Court.

The Supreme Court opinion was filed Feb. 18, 1930.

The Supreme Court affirmed the judgment.

Case, Supreme Court Opinion, pp. v-vii.

A writ of error was sued out to this Court on March 1, 1930.

Case, Writ of Error, p. i.

The evidence offered by the State consisted of the testimony of

(a) The Assistant County Physician, who performed the autopsy. Case, pp. 11-14.

(b) An interne at St. Elizabeth's Hospital, Elizabeth, to which the deceased was taken after the accident. Case, pp. 16-29.

(c) Dr. Barr. Linden Police Surgeon, who examined defendant after the accident. Case, pp. 16-29.

(d) Mrs. Fitzpatrick, the widow of the deceased. Case, pp. 35-36.

(e) Elmer R. Vreeland, who was driving a car in the same direction as defendant. Case, pp. 36-46.

(f) Harry Knierim, who was with Vreeland. Case, pp. 47-54.

(g) Harry Weitzman, a Linden policeman, who reached the scene shortly after the accident. Case, pp. 54-58.

(h) Ethel Shirling, to whose garage defendant went after the accident. Case, pp. 59-60.

(i) Michael Breen, another Linden policeman, who also reached the scene shortly after the accident. Case, pp. 61-65.

(j) Frank Kenny, who had talked to deceased shortly before the accident, and who was driving a car going in the same direction as deceased was going. Case, pp. 65-69.

(k) Eight photographs, two of the scene of the accident, two of deceased's motorcycle after the accident, and four of defendant's automobile after the accident.

The evidence offered by the defendant consisted of the testimony of:

(a) Dr. Steele, who examined defendant after the accident. His testimony was taken out of turn. Case, pp. 29-34.

(b) Louis Sax, who was driving a car immediately ahead of defendant, and whom the deceased had passed about two seconds before the accident. The Court refused to allow this witness to testify as to the speed at which deceased passed him and other facts contended to be relevant.

Case, pp. 71-78.

(c) Harry G. Barton, a former motor vehicle inspector, who testified as to defendant's reputation.

Case, pp. 78-83.

The defendant did not testify.

**Facts.**

Deceased, a park policeman, was riding his motorcycle on St. George Avenue, Linden, on October 16, 1928, about 6.15 P. M., going toward Elizabeth. Defendant's car was going in the opposite direction toward Rahway and was on the right side of the road, where it should have been, according to the State's testimony, and was being properly driven, according to the State's testimony. There was a head-on collision. Deceased died about twenty-four hours later as the result of his injuries. Defendant was going about twenty-five miles an hour, according to the State's testimony. The Court refused to allow testimony on the part of defendant as to the speed at which the deceased was going. One physician, a Linden police surgeon, testified that defendant was intoxicated; another physician, a Linden physician, who had never seen defendant before and knew nothing about him, testified that defendant was not intoxicated.

It was dark at the time of the accident, and the only witnesses testifying as to the immediate facts of the accident were the State's witnesses Vreeland and Knierim, who were in a car about twenty-five feet in the rear of defendant's car. Vreeland's description of what he saw, after testifying that his attention was attracted by

“The loud sound of a crash.”

Case, p. 36, lines 12, 13.

was

“I saw a cloud of dust go up and I saw a man slip off the hood of Charles Oliver's car right in front of us.”

Case, p. 37, lines 39-40; p. 38, line 1.

Knierim's description, after testifying that his attention was attracted

“By a crash in front of us—a terrific crash.”

Case, p. 48, line 31.

was

“Well, I saw an object going up through the air.”

Case, p. 49, lines 14, 15.

“In the front of this sedan; and it struck on the sedan and slid off right to the highway.”

Case, p. 49, lines 16-18.

It was agreed that St. George Avenue at the place of the accident had an improved surface of thirty-five feet with a shoulder of seven feet on each side.

Case, p. 46, lines 12-23.

Defendant's car, according to the State's testimony “went close on to fifty feet” after the accident, but the glass from the motorcycle light was only “about forty feet back on the roadway.”

Case, p. 50, lines 14, 15; lines 21, 22.

Defendant's car was in the place where it should have been, according to the State's testimony, and had been for two hundred feet back, and had been and was being properly driven.

Case, p. 42, lines 38-40; p. 43, lines 1-28.

Although the testimony covers about seventy-three pages, the above fairly summarizes the essential portions.

The accident did not occur at a crossing of streets.

### Reasons for Reversal.

There are eleven reasons for reversal, and the entire record of the proceedings are certified.

Case, Reasons for Reversal, pp. 100-102.  
Case, Judge's Certificate, p. 95.

All these reasons are relied upon, but for purposes of argument they may conveniently be grouped under two heads:

1. State did not have a case on which a verdict of guilty could be legally predicated.
2. Errors of the Court.

### State Did Not Have a Case.

A simple reading of the case shows that the verdict was against the weight of the evidence.

1. There was not any proof of any kind of negligence against the defendant, much less proof of criminal negligence, and negligence must be proved as a fact. It will never be presumed.

2. The State's testimony was that the defendant was operating his car properly, on the right side of the road, and going about twenty-five miles an hour. This negated negligence in the absence of other proof.

3. Intoxication, even if proven conclusively, is not *per se* proof of criminal negligence. But intoxication was not proven beyond a reasonable doubt. One physician, a police surgeon, concluded that defendant was intoxicated from certain tests that he made, but his testimony did not stand up on cross-examination. Another physician, who did not know defendant nor anything about him, testi-

fied that he was not intoxicated. Two policemen and two other people were at the scene of the accident immediately after it occurred, and the testimony of three of these people (one policeman said that he did not see him), as to defendant's actions would not lead to the conclusion that he was intoxicated. That defendant was nervous after such an accident was but natural. Any one would be to have a motorcycle come full tilt at one in the night when one's car was on the right side of the road, going at about twenty-five miles an hour, and being properly driven. But defendant's actions after the accident were not those of an intoxicated person. In fact, quite the reverse.

## II. Errors of the Court.

1. There being no criminal negligence shown the Court should have directed a verdict of acquittal at the close of the State's case. Failing to do which, the Court should have directed a verdict of acquittal at the close of the entire case. (Second and Fourth Assignment of Errors; Second and Fourth Reasons for Reversal.)

Case, Assignment of Errors, p. 96, lines 34-36; p. 97, lines 6-10.

Case, Reasons for Reversal, p. 100, lines 11-14; p. 100, lines 20-24.

2. The question of reasonable doubt in this case was a Court, and not a jury, question and as such should have been resolved by the Court in the defendant's favor. Such doubts were apparent on the face of the entire case as to make the question of reasonable doubt a legal, not a factual, one.

3. The Court erred in not charging the various requests which were refused. Take especially the request contained in the seventh reason (Case, p.

101, lines 1-13), or the one in the eighth reason (Case, p. 101, lines 14-28), or the one in the ninth reason (Case, p. 101, lines 29-37), how can the refusal of the Court to charge these requests be justified? They contain proper statements of legal principles pertaining to the question to be decided.

4. The Court erred in refusing to allow defendant to prove that the deceased was going at an excessive rate of speed two seconds before the accident.

Case, p. 72, lines 21-40; pp. 73-74, lines 1-25. Case, p. 76, lines 32-34.

Anything occurring within two seconds of an occurrence, and within its immediate vicinity, and which has any bearing, or tends to have any bearing, on that occurrence, is within the *res gestae* and as such may be proven.

That the Court, moreover, was wrong in its conception of the law applicable to the proof offered is shown by the Court's ruling as to what the Court would permit the defendant to prove, or rather what the Court would not permit the defendant to prove.

Note the following on the direct examination of Louis Sax, a witness for defendant:

“Q. And as you got to the part of the road that is shown on that photograph, will you just turn and tell the jury what happened?  
A. I was traveling in the direction of Rahway at about twenty miles an hour, and all of a sudden I heard a motorcycle; I heard the roar of a motorcycle passing me so close that I pulled my wheel tight and turned to one side for fear he would hit me. He must have been going about——”.

Case, p. 72, lines 20-28.

But the witness did not get any further, for he was interrupted by the Assistant Prosecutor, and a colloquy ensued between the Court and defendant's counsel, in which this occurred:

"The Court: \* \* \* you must show that the defendant is not guilty of that which the State alleges; namely, the reckless disregard—a wanton disregard of human life.

Mr. Crane: That is what I am trying to show.

The Court: You won't be able to show it by trying to show what the deceased did.

Mr. Crane: I think I will.

The Court: I won't let you do it. I state it to be the law, that you cannot do it."

Case, p. 73, lines 26-37.

Can it possibly be the law that the defendant could not show that he was not guilty by showing what the deceased did? Is the defendant precluded from showing how the deceased came to his death, simply because the prosecutor claims something different?

This error of the Court evidently came from confusing proof of negligence of deceased which might have contributed to the accident causing his death and primary negligence of the deceased which, without any contributing negligence on the part of the defendant, actually did cause the accident resulting in deceased's death. But even so, the jury should be the judge as to the bearing such testimony would have on the verdict to be arrived at, subject, of course, to the instructions of the Court. This confusion in the mind of the Court evidently led to the Court's refusal to charge as noted in the seventh and eighth Reasons hereinbefore referred to. That proof of such primary negligence would be admissible would not seem to need argument, especially so when that proof is part of the *res gestae*. Suppose one is driving

along a street at ten miles an hour and a child suddenly runs out at night without the slightest warning from behind a tree and in front of the car and into the bumper or fender and is thrown by the impact against an iron trolley pole, sustaining a fracture of the skull, from which the child dies. Would not proof of such action on the child's part conclusively exonerate the driver of the car? And why would not such proof be admissible?

### Supreme Court Opinion.

There are certain statements of alleged fact in the Supreme Court opinion which can not be passed over in justice to the plaintiff-in-error without attention being called to them.

1. In the very first paragraph the opinion (a *per curiam* one) says:

“The crime grew out of the reckless driving of an automobile by the plaintiff-in-error on a public highway, causing the death of one Edwin Fitzpatrick.”

Case, Supreme Court Opinion, p. V, lines 30-40.

This statement prejudices the case at the start, because (a) there is no crime until it is finally so adjudged, and (b) there is no reckless driving until it is likewise finally so adjudged. To start out a discussion of a case with such a statement would seem to indicate a wrong point of view of the matter under consideration.

2. The opinion further says:

“No testimony was offered on behalf of the plaintiff-in-error, and the case was submitted

to the jury on the testimony adduced by the state."

Case, Supreme Court Opinion, p. VI,  
lines 28-30.

There are <sup>eighteen</sup> ~~twelve~~ pages of testimony offered on behalf of the plaintiff-in-error.

Case, <sup>Testimony</sup> ~~Supreme Court~~ Opinion, pp. 71-83.

And the great error, as the plaintiff-in-error claims, made by the trial Court was in the refusal by the trial Court to allow plaintiff-in-error to submit further testimony by one of defendant's witnesses. Note the offer by defendant's counsel when the Court said to him:

"You must show that the defendant is not guilty \* \* \*."

(Parenthetically it might be remarked that the law is usually understood to be that the state must show that the defendant is guilty.) And defendant's counsel said:

"That is what I am trying to do."

And the Court replied:

"You won't be able to show it by trying to show what the deceased did."

And defendant's counsel said:

"I think I will."

And the Court replied:

"I won't let you do it. I state it to be the law, that you can not do it."

Case, p. 73, lines 26-37.

It is thus seen that there was testimony offered and accepted on behalf of the plaintiff-in-error and further testimony offered which was not al-

lowed to be submitted. Clearly a complete refutation of the statements in the Supreme Court opinion that "no testimony was offered on behalf of the plaintiff-in-error," and that "the case was submitted to the jury on the testimony adduced by the state."

3. The opinion further says:

"It further appeared from the testimony of two physicians that he was intoxicated."

Case, Supreme Court Opinion, p. VII,  
lines 5-7.

There were only two physicians who testified as to intoxication, one for the state and the other for the defendant. The testimony of Dr. Steele, a witness for defendant but a stranger to him, as to intoxication was:

"Q. You made an examination of him? A. Yes, sir.

Q. What was the purpose of that examination? A. The purpose was to find out whether he was intoxicated or not.

Q. And after you had made your examination, did you form an opinion as to whether he was intoxicated or not? A. Yes.

Q. And what opinion did you form? A. I formed the opinion that he was not intoxicated."

Case, Dr. Steele's Testimony, p. 29, lines 27-40; p. 30, lines 3-4.

On cross-examination this witness was asked the catch question, easily misunderstood:

"Q. When you examined him, you could tell that he had been under the influence of liquor, could you not? A. Yes."

Evidently the doctor thought this question to mean that if defendant had been under the influ-

ence of liquor he could have told, because later when asked:

“Q. How long before your examination would you say that he had been in an intoxicated condition? A. I did not find any evidence that he was intoxicated.

Q. Didn't I ask you about that, and didn't you state that you could tell he had been intoxicated? A. I did not find any evidence that he was intoxicated.

Q. Didn't I ask you about that, and didn't you state that you could tell that he had been intoxicated? A. I misunderstood the question.”

And more to the same effect.

Case, Dr. Steele's Testimony, p. 31, lines 35-37; p. 34, lines 4-10, etc.

4. The opinion also says:

“There was also testimony that he was driving his automobile along the public road at a speed of more than twenty-five miles an hour.”

Case, Supreme Court Opinion, p. VII, lines 7-9.

And again:

“\* \* \* at a speed of more than twenty-five miles an hour.”

Case, Supreme Court Opinion, p. VII, lines 7-9.

The testimony was not to “a speed of more than twenty-five miles an hour”, but to “a speed of about twenty-five miles an hour”. As note the following testimony by the state's witness:

“Q. How fast was Oliver traveling at that time, if you know? A. About twenty-five miles an hour.

Q. At the time of the accident? A. Yes."

Case, Vreeland's Testimony, p. 42, lines 32-34.

5. The opinion, by laying stress on the fact that the driver had but one arm, would seem to hold that to be a factor in arriving at his guilt; as note what the opinion says:

"The record discloses that the plaintiff-in-error has only one arm."

Then follows the erroneous statement (before noted) about two physicians testifying to intoxication, and then another erroneous statement (also before noted) that the speed was more than twenty-five miles an hour, etc., and then the conclusion:

"We think, therefore, that the trial judge was fully warranted in refusing to take the case from the consideration of the jury."

Case, Supreme Court Opinion, p. VII, lines 4-19.

And then follows:

"We cannot help observing here, that a man with one arm," etc.

Case, Supreme Court Opinion, p. VII, lines 19, etc.

There may very fairly be a diversity of opinion on the abstract question of the desirability of giving a person with but one arm a license to drive, but since the State of New Jersey does give a person of but one arm a license to drive, and did so in this instance, that fact should not mili-

tate against him. If the law is bad, change the law by legislative enactment. The fact should not be cited to a driver's detriment.

Case, Michael Bree~~ze~~'s Testimony, p. 62, lines 19-28.

It is most respectfully submitted that the Supreme Court erred in affirming the judgment of the Union County Sessions and that the conviction should be set aside.

AUGUSTUS S. DREIER,  
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W. S. ANGLEMAN,  
Of Counsel.

May Term, 1930.

As to contributory negligence in criminal cases:  
 Estell vs. State, 51 N. H. 182.  
 State vs. Elliott, 94 N. H. 76.  
 State vs. Campbell, 82 Conn. 671; 18 Conn. Cas. 236.  
 Selwitz vs. State, 89 Neb. 34; Conn. Cas. 1912 C. 495 and  
 annotations.

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PHYSICS DEPARTMENT

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Very respectfully,  
Yours truly,  
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